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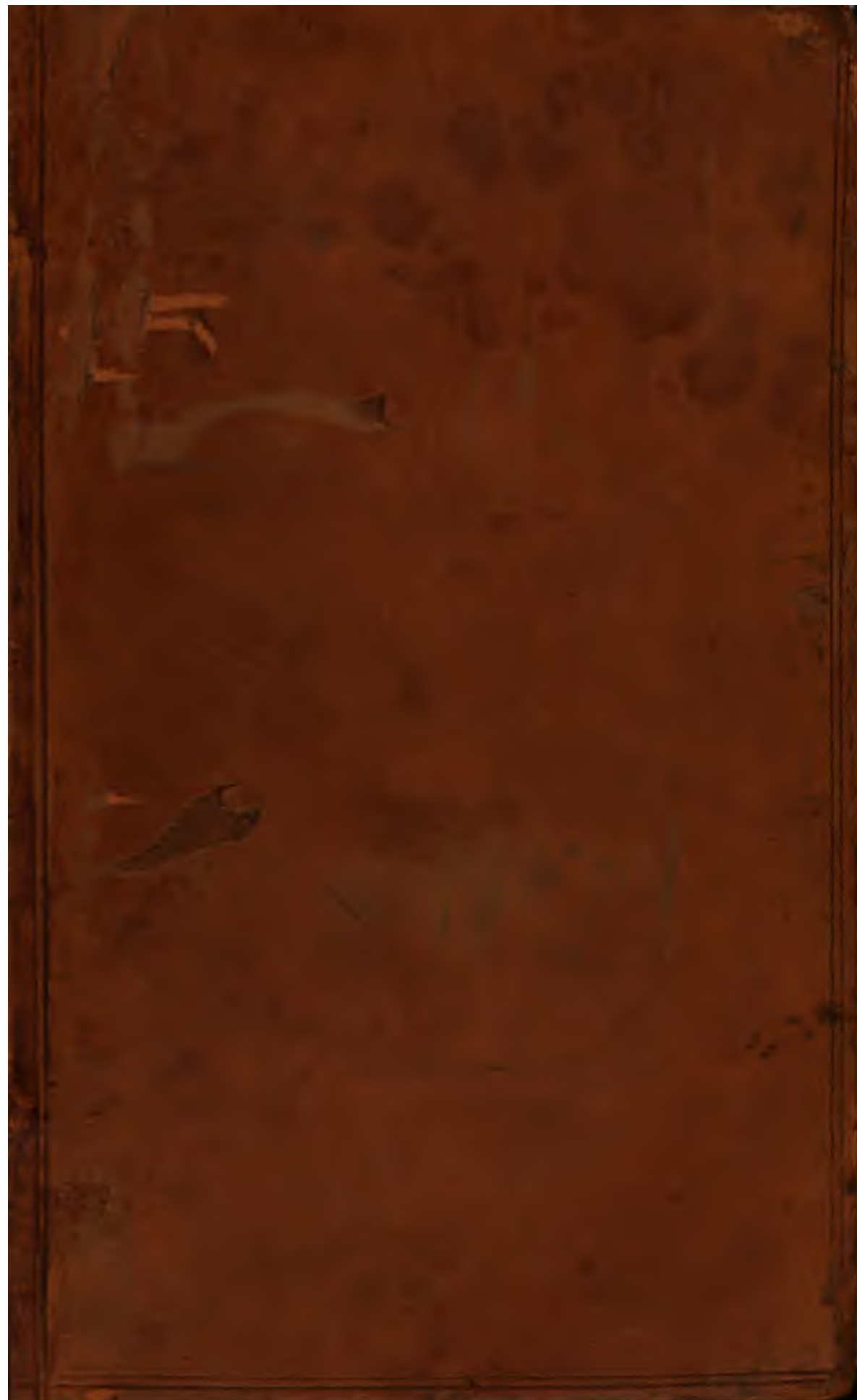
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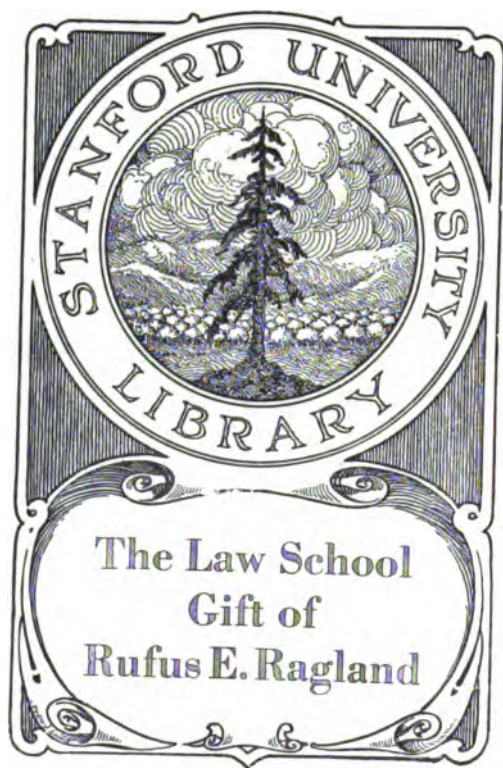
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James P. Bradwell

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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
BEFORE THE
RIGHT HON. SIR JAMES WIGRAM, KNT.
VICE-CHANCELLOR.

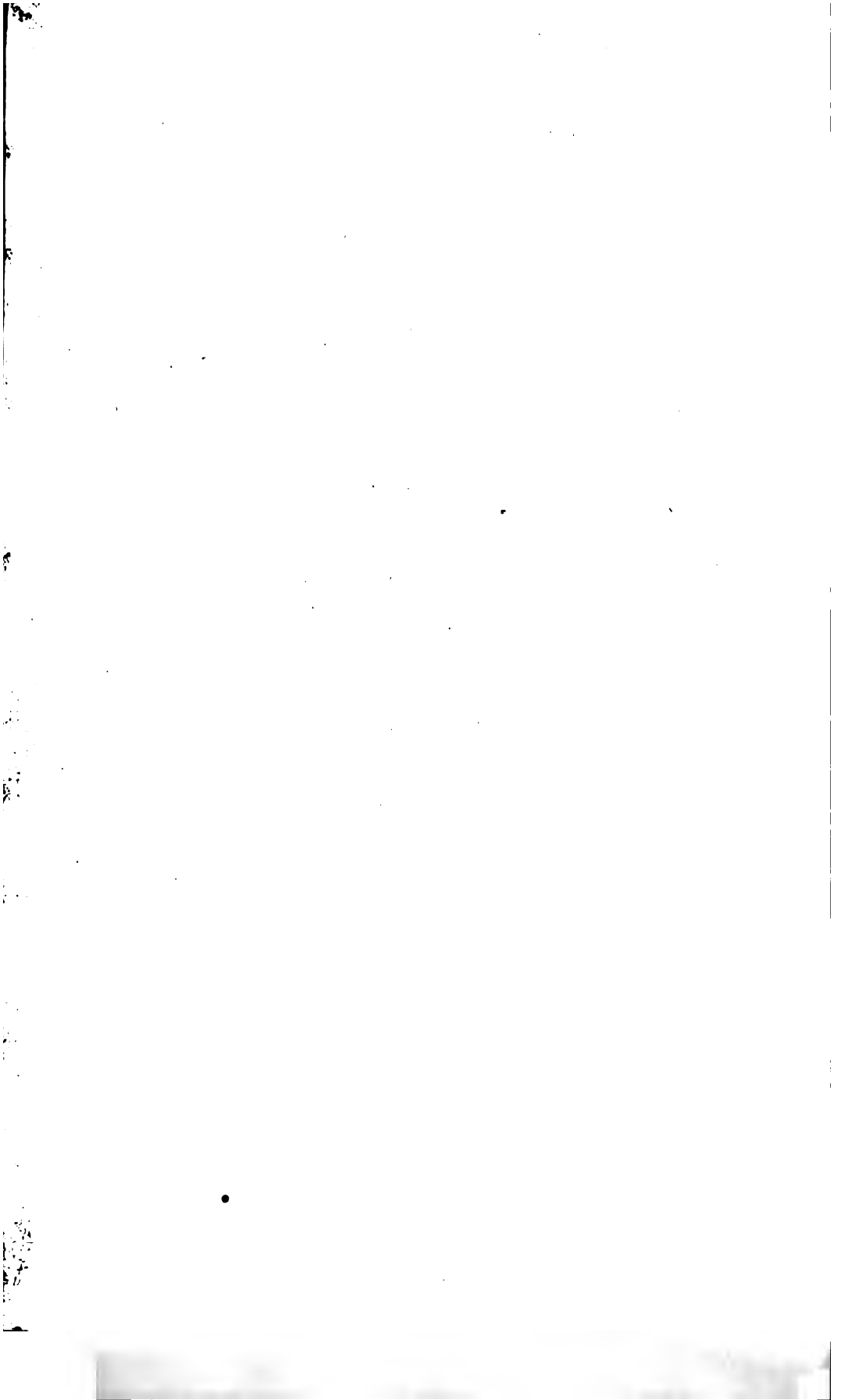
**WITH NOTES AND REFERENCES TO BOTH ENGLISH AND
AMERICAN DECISIONS.**

BY E. FITCH SMITH,
COUNSELLOR AT LAW.

VOL. XXIV.
CONTAINING HARE'S CHANCERY REPORTS, VOL. 2.
1842, 1843—6 & 7 VICTORIÆ.

NEW-YORK:
BANKS, GOULD & CO., LAW BOOKSELLERS.

ALBANY:
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1851.



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BY THOMAS HARE,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

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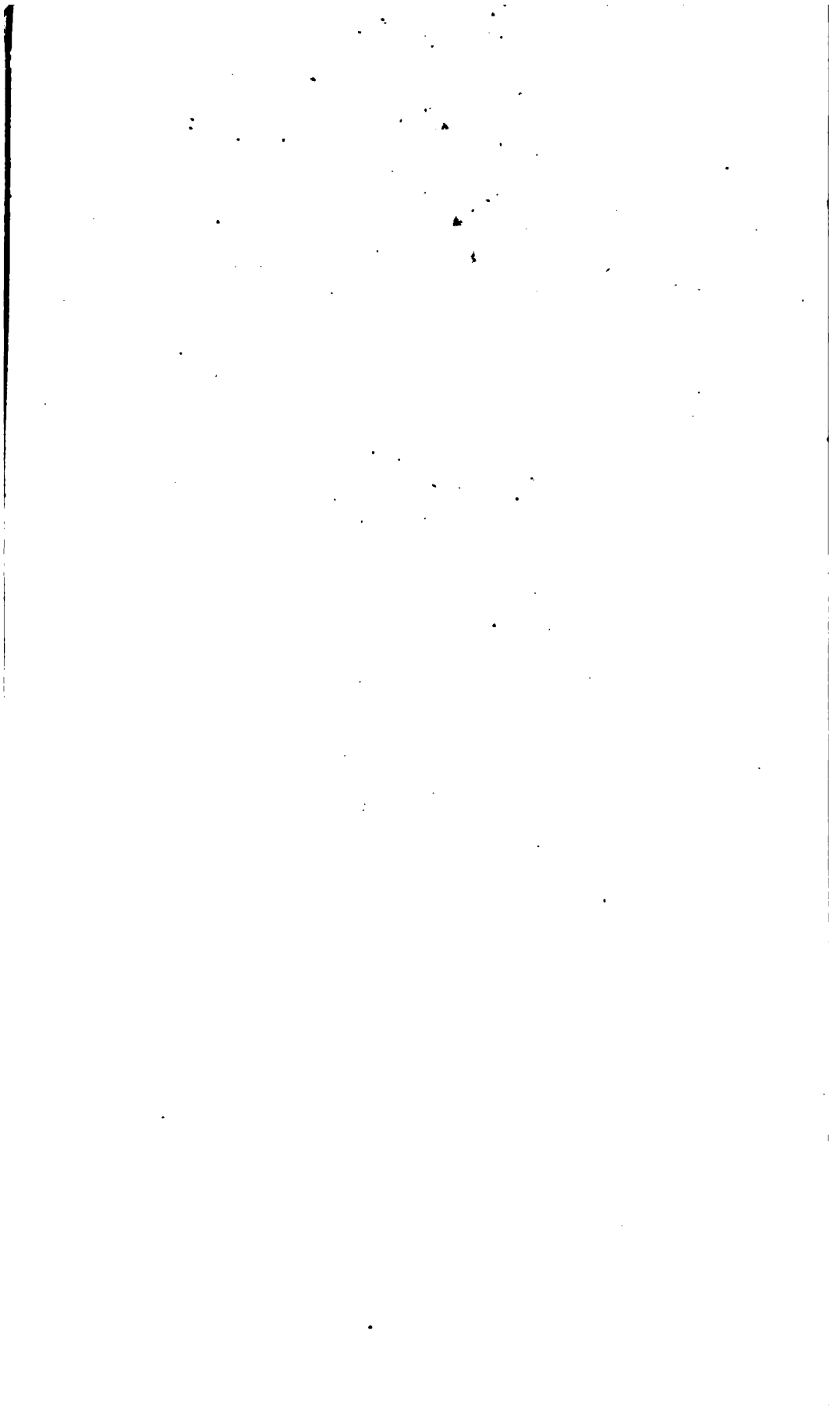
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SIR LANCELOT SHADWELL, *Vice-Chancellor of England.*

SIR JAMES L. KNIGHT BRUCE, }
SIR JAMES WIGRAM, } *Vice-Chancellors.*

SIR FREDERICK J. POLLOCK, *Attorney-General.*

SIR WILLIAM WEBB FOLLETT *Solicitor-General.*



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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE

THE RIGHT HON. SIR JAMES WIGRAM, KNT.

VICE CHANCELLOR.

COMMENCING IN EASTER TERM, 5 VICT. 1842.

BENTINCK v. WILLINK.

1842: 16th and 18th May.

Equity confessed on the answer.

Bill by the owner of an estate in Demerara, against an incumbrancer thereon, to restrain him from enforcing payment in this country of notes which had been given for part of the debt, on the ground that the incumbrancer could not deliver up the grosse copy of the acts of hypothecation, which it was alleged was necessary to a valid discharge. The common injunction was obtained. The answer admitted that the incumbrancer had no grosse copy in his possession, and that a second grosse copy would not be issued by the court without indemnity; but it did not state for what purpose or on whose favour the indemnity was required, or that grosse copies had not been actually taken out in respect of the charges which the Defendant had upon the estate, or that any inquiries or searches had been made in reference to these questions, or that any cancellation or discharge had been entered in Court in respect of the previous payments on account of the debt. The Plaintiffs and the Defendant had both acted with regard to the estate, in their previous dealings concerning it, without requiring the production of the grosses. The Court dissolved the injunction, upon the incumbrancer giving security to indemnify the Plaintiffs from any consequence arising from the absence of the grosses.

The Courts of this country will apply the general law of this country, (being abstractedly just, and not exclusively founded upon any peculiar or technical rule,) to questions relating to lands in a colony, where a different system of jurisprudence prevails, unless it is suggested or shown that the laws of the colony are diff.

 1841.—Bentinck v. Willink.

ferent on the point in question ; and therefore the mortgagee of an estate in Demerara was held not to be bound to produce his securities for inspection before payment.

THE Plaintiffs were the owners of certain plantations in the colony of Demerara, subject to several debts, in the nature of mortgages, inasmuch as they were specific and redeemable charges upon [2] the estates. These charges were created at different periods, from 1799 to 1829 ; and all the interest in those to which the question upon the present motion referred, had, by several instruments to which the Plaintiffs and Defendant were parties, become vested in the Defendant, who had paid off the original incumbrancers. The debt or charge of the Defendant was reduced by his receipt of the compensation-money paid in respect of the slaves ; and in May, 1837, an arrangement was entered into between the Plaintiffs and the Defendant, by which the amount remaining due was ascertained, and agreed to be paid in five annual instalments, for which the Plaintiffs were not to be personally liable ; but the securities of the Defendant upon the estates were to subsist until the whole was paid off ; yet, if the payment of every instalment was made within six months from the time it became due, the security of the Defendant on the property was not to be put in force. In 1838, the change in the laws affecting labour in the colonies was said to have occasioned a difficulty in providing for the first instalment ; and the Defendant consented to postpone, for some months, the time of payment of part of that instalment, the Plaintiffs giving their promissory note for the payment of the amount, in respect of which the time was so enlarged. It did not appear that any question had been raised before the year 1838, with respect to the production of the instruments upon which legal effect was given to the securities as specific charges upon the estate ; but, in 1838, the Plaintiffs requested that the "original mortgages," and subsequently that the "grosse" might be produced, which the Defendant expressed his readiness to do when required. A meeting afterwards took place, to which the securities were to be produced, when it appeared that the instruments in possession of the Defendant were copies of the act of the Court, by which the charge upon the estate was authenticated ;

1842.—*Bentinek v. Willink.*

but were not the copies designated as "grosses." "The promissory note given for the instalment in arrear became [*3] due in July, 1839, and the Defendant brought his action upon it and recovered Judgment. The bill was filed for an account of what was due to the Defendant and to restrain proceedings in the action in respect of this security, until the production and delivery up of the grosse copies to the Plaintiffs. Execution was stayed by the common injunction.

Upon the filing of the answer the order nisi to dissolve the injunction was obtained. The only material question was with regard to the character and value of the grosse, and the effect of its absence, or of any separate dealing with that instrument, upon the title to the estate, according to the law of Demerara (a).

Mr. *Girdlestone* and Mr. *James Parker*, for the Plaintiffs, shewed cause against dissolving the injunction, and argued that the grosses, when taken out, became the title-deeds of the mortgagees; that unless the mortgagee was prepared to deliver up the grosse copies upon payment of the mortgage-money, he was not in a situation to reconvey the estate, and therefore should not be permitted to enforce payments made in respect of the charges on the estate ought in fact to be written off upon the grosse, in order to constitute the proper evidence of payment; that other interests in the estate may have been created by assignment or deposit of the grosses, by the prior mortgagees; and, unless the transaction were duly written off on the grosse, interests might subsequently be created by transfer of those instruments to other persons without notice of the discharge of the debt to which they related. That the Court in Demerara would not grant a second grosse copy, and therefore, unless the Court continued the injunction, the Plaintiffs would be [*4] compelled on the one hand to pay the sum due upon the security; whilst, upon the other, they would not be enabled to raise money by a mortgage of the estate to other persons: *Vanderlinden, Institutes of the Law of Holland*, by Henry, p. 258: 2 *Burge, Co-*

(a) The extent of the admission in the answer, with respect to the law of Demerara on this subject, will appear in the judgment.

1841.—*Bentinck v. Willink.*

lon. Law, p. 722 : where, after observing that the transport is entered amongst the *actes* of the Court, from which the secretary gives the parties *une grosse*, it is added,—“ The production of this instrument affords the proof of the preceding title on which this judicial act of delivery has taken place.” *S. V. Leeuwen*, lib. 4, c. 7, ss. 10, 12; *Report of the Law of Demerara*, p. 208. In *Schoole v. Sall (a)*, the Court restrained a mortgagee from proceeding at law against the mortgagor upon his bond, when he was not in a condition to deliver up the title-deeds: *Stoke v. Robson (b)*, *Smith v. Bicknell (c)*, *Shelmardine v. Harrop (d)*.

Mr. *Burge*, Mr. *Sharpe*, and Mr. *Goulburn*, for the Defendant.

There is no analogy between the “*grosse*” of the act of Court, in British Guiana, and a mortgage-deed in this country. The *grosse* is in no point of view the security. The appearance of the party in Court personally, or by his attorney, and his acknowledgment of the hypothecation of the property, creates the charge upon it. No interest could be acquired in the property by transfer, delivery, or other dealing with the *grosse* of the mortgage. By the law of British Guiana, no interest can be acquired in immovable property, either on sale, mortgage, or transfer of the mortgage, unless by an act in Court in which the vendor, mortgagor, or mortgagee, [*5] either personally or by attorney, sells, mortgages, or assigns, and the purchaser, mortgagee, or assignee personally or by his attorney, accepts the property sold, mortgaged, or ceded to him. *Voet*, lib. 20, tit. 1, n. 9; *Grotius*, *Manud. ad Jurisp. Holl.* lib. 2, cap. 48, n. 36, 37 (a). The *grosse* is nothing more than an office-copy of the record of the transaction in the Court, although it may be distinguished from other office-copies somewhat as the probate copy of a will granted by the ecclesiastical court is distinguished from other copies issued out of the same Court. Neither of the parties to the hypothecation are compelled to take out a *grosse*

(a) 1 Sch. & Lef. 176.

(b) 3 V. & B. 51.

(c) Id. n.

(d) 6 Madd. 39.

(e) As to the cessions or assignments of mortgages, see also *Voet*, lib. 18, tit. 4, n. 11, and lib. 20, tit. 4, n. 35; *Sande, de Cess. Act.* 2, n. 10, 11, p. 7.

1842.—Bentinck v. Willink.

copy of the act; and it is in fact often omitted. There is no evidence in this case that any *grosse* copies were taken, and there is evidence that none of the *grosse* have come to the possession of the Defendant. It is not the custom, and there is no law requiring, that payments on account of the debt for which the estate is hypothecated, should be written off upon the *grosse*. The act of cancellation, entered upon the records of the Court, is the proper evidence of the satisfaction of the mortgage; and that is effected without production of the *grosse*. It resembles, in this respect, the entry of satisfaction of a judgment in this country.

VICE-CHANCELLOR:—

The case suggested on the part of the Plaintiffs, and which is admitted by the Defendant, is, that the mortgages in this case were made according to the Dutch law, and that the form of a Dutch mortgage differs from that of an English mortgage. It is not effected by means of a private deed between the parties,—but the parties go into Court, and the mortgage is effected *by an [*6] act of Court, which creates the specific charge, and that act of Court is, in truth, the original mortgage: it is the security itself, and nothing else constitutes the security. It appears, however, that there is a practice for the mortgagee to take out what is called a *grosse*, which I believe means nothing more than an engrossment; but it differs from all other office-copies, whether engrossed or not, in this,—that it is considered as the authentic document which evidences the title of the mortgagee; and it appears that the Court will never grant a second *grosse* copy. It does not appear that there is any restriction to the number of office-copies which are given out, but they will not grant a second *grosse* copy, unless the loss of the first be sufficiently proved, and the party applying for the second *grosse* copy enters into an indemnity against any possible consequences of their being two *grosses* in existence.

Now, the Plaintiffs allege that the *grosse* is the only evidence of the existence of the mortgage. They allege, that when a mortgage is satisfied, it is necessary that the *grosse* should be produced in order

 1842.—*Dentick v. Willink*.

that the mortgage may be cancelled, and satisfaction may appear by act of Court, as the original mortgage appears by act of Court also. They say where a mortgagee pays off money without the grosse being produced, the payment will not operate to the discharge of the estate, if, in truth, the grosse has been parted with to an assignee; and they say, whenever the mortgages are dealt with, the dealing should appear on the grosse, and by those means the mortgages are transferred from hand to hand. Under these circumstances, they pray,—not that the transaction of 1837 may be set aside or avoided,—but that they may in fact have the benefit of the agreement of 1837, and that the Defendant may be restrained from proceeding in an action which he has brought on the note, and also from bringing any other action (though there is no case of that nature now before me) until the grosses copies are produced. It is admitted by the Defendant, that, in point of fact, he has no *grosse* whatever in his possession; and he admits, further, that no act whatever has been done to cancel or satisfy the mortgages, except so far as they are cancelled and destroyed by the effect of the payment of the money in satisfaction of the mortgage.

The question which I have now to determine is, whether, on the answer, there is an equity confessed by the Plaintiffs, in this stage of the cause, to have the proceedings in the action stayed until the hearing, and either the grosses produced, or the Plaintiffs protected against that injury, which they say they shall or may be exposed to, if they pay the money without having the grosses produced and satisfaction entered on them.

I observed, during the argument, that it was quite impossible I could continue the injunction upon any other terms than that the Plaintiffs should bring the money into Court. The bill does not dispute Mr. *Willink's* right to receive the money: the Plaintiffs do not say they are not his debtors, or that the money is not due to him at the present moment. The gravamen of the case is, that, if they now pay the money, Mr. *Willink* is not in a position to give the estate a valid discharge, because the grosses are not in his possession. The payment of the money into Court, if the injunction is continued, is a

1842.—*Bentinck v. Willink*.

point on which, in such circumstances, I have no discretion,—nothing being sought by the bill but protection against a possible loss.

The next point is one that is prominently brought forward on the pleadings, and was urged at the bar. The Plaintiffs say, that if the grosses were in the Defendant's possession, ['8] and were produced, they should have no difficulty whatever in obtaining the amount of the Defendant's demand on the security of the estate. No persons, they assert, will advance money on the security of an estate, subject to the Dutch law, unless the grosses be produced, and therefore they cannot, as they otherwise might, raise the money on this security. It is not alleged, however, that there is any right, according to the Dutch law, in a mortgagor to call on a mortgagee to produce the *grosse*, or the title deeds, until the mortgage is satisfied; and there being no suggestion of any peculiarity in that respect in the Dutch law, I can only consider what the law of this Court is. Now I believe that no point is better settled than this,—that where a mortgagor is proceeding against his mortgagee, a court of equity will not compel the mortgagee to produce his securities, except on payment of the mortgagee's claim; and the rule does not depend upon any peculiarities of system, but is founded on principles of abstract justice. This part of the Plaintiffs' case, therefore, in administering justice in this country according to its laws, I am bound not to regard, however the circumstances may, in that respect, operate injuriously to the Plaintiffs.

The point which was principally urged on the part of the Plaintiffs, and for which there is probably some foundation, is this,—that at the time when they came to the agreement of 1837, and when they gave the promissory note of 1838, they supposed the grosses to be in the possession of the Defendant; and they say that, having been induced to execute the deed, and to give a promissory note in that confidence and belief, and, as they say, on the representation of Mr. *Willink* that he had the grosses in his possession, therefore the Court ought to restrain the proceedings in the action. There are two ways of considering this point,—either as giving the Plaintiffs an equity to be relieved from the effect of ['9] the transaction of 1837, and of the promissory note, or,

1842.—*Bentinck v. Willink*.

as affording a reason why the Court should not allow the money to be received by the Defendant until the grosses are produced, or an indemnity given against the consequences of their absence.

It is impossible to regard the case of the Plaintiffs in the first of these aspects, upon the present pleadings. The bill does not seek to set aside the transaction on the ground of misrepresentation; but it prays that the Plaintiffs may have the benefit of the agreement of May, 1837; and, with respect to the note, it only prays that payment may be stayed until the grosses shall be produced: and I presume, though the bill does not say so, until security shall be given against the consequences of the non-production of the grosses, if they exist. I must, therefore, hold the Plaintiffs bound by the transaction of 1837, and I must hold Mr. *Willink* entitled to receive the payment which he seeks to enforce, unless the note stands in a different position from the other part of the transaction. Now I cannot look upon this note as being any thing but a substitution, by agreement between the parties, for the first instalment. If no note had been given, Mr. *Willink* would have been in the position to have enforced his remedy in the colony of Demerara, and, if he had proceeded there, which it is to be regretted that he has not had the opportunity of doing, the question, which creates the difficulty here, would never have arisen. The Courts in the colony would deal with the subject there as a question of law, whereas here I am obliged to deal with it, being a point of foreign law, as a question of fact; and, therefore, it is that I am embarrassed in knowing what the truth of the case is with regard to the rights of the parties.

[*10] I must for the present purpose consider the transaction of 1837 as valid, and the promissory note as a substitution for the first instalment, standing in precisely the same situation as the first instalment, if the note had not been given. So far I have no difficulty. If the case had rested there, I should have had no discretion but to dissolve the injunction and allow the law to take its course. The answer of Mr. *Willink*, however, prevents me from thus disposing of the case. Mr. *Willink*, admits by his answer that a second grosse copy will not be given out without proof of the loss of the first grosse. If he had stopped there I should probably have felt

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no great difficulty in explaining that transaction without affecting the rights of the parties; but he goes on to say, that an indemnity is required by the Court on the second grosse being delivered out. Now, in favour of whom is that indemnity required? I can understand that the indemnity may be required, not in favour of the mortgagor, but for the protection of other parties to whom the grosses may have been transferred; but it is also possible, as the Plaintiffs insist, that a question may arise between the mortgagor and an assignee of the grosse, if the Plaintiffs pay the mortgage-money to the Defendant, with the knowledge that the grosse is not in his possession.

This bill was filed in April, 1840, and Mr. *Willink's* answer was not filed until March, 1842. I must presume, as his answer leads me to suppose, that, during that period, he had inquired into the Dutch law: it would appear that he has done so, from various general statements which he makes as to his information and belief respecting that law; he gives me no information as to any inquiries which he has actually made upon these very material points: he says that originally grosses were not usually demanded,—that, at the present day, they are not universally demanded, but he does not tell me,—and he says he does believe, “that [‘11] grosses were delivered out in respect of the mortgages in question. It is remarkable that he has not stated,—which if he had stated I should probably have been bound to act on,—that search has been made on the records of the Court in Demerara,—and that he is able to state, as a fact resulting from that inquiry, that no grosses existed or were delivered out. It may be quite true, that he has never seen the grosses of the original mortgage, or of his own mortgage; but it is equally true, that a grosse may have existed. I give entire credit to what Mr. *Willink* states,—that there have been no incumbrances whatever created on this estate, to which he has been a party. The case rests solely upon the possible situation of the older mortgages.

In stating that the indemnity is required, the Defendant might have gone on to say in respect of what parties,—or in favour of what parties it is, that the Court requires that indemnity. I am

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left in total ignorance on this point, although Mr. *Willink* might have given me precise information upon it, and might have stated, that he had taken the opinion of competent persons, and told the Court what that opinion was. It is those points, on which the Defendant might have given, but on which he has omitted to give me information, that have occasioned the great difficulty I have felt in disposing of the case.

The rule of the Court, requiring that there should be an equity confessed by the answer in order to sustain an injunction, does not require that the equity so appearing should constitute such admission by the Defendant as, on the face of the answer, would entitle the Plaintiff to a decree. The meaning of an equity confessed on the answer is, that the Defendant has thereby admitted such facts as suffice to shew the Court that there is a question to be [*12] tried, before it can safely allow the subject-matter of the suit to be disposed of in a court of law upon a question over which that Court has no jurisdiction, and where the facts, which are the ground of equitable interference, cannot be the subject of adjudication. I have had great difficulty in seeing how it was possible to avoid the conclusion, that the admission of facts in the answer,—unexplained as they are, where I cannot help thinking that more explanation might easily have been given,—throws so much doubt on the question of right, that I ought to restrain the action till I know more of the facts than I am at present informed of. The statements in the answer leave very much to be ascertained before the Court can know what it is doing.

On the other hand, there are observations of the strongest kind which arise in regard to the Plaintiffs' case. If the Plaintiffs' suggestion be true, that no payment or retainer by a mortgagee is good, unless indorsements are made on the grosse, they are involved in the absurdity of supposing that a mortgagee in possession, or a consignee receiving produce, and applying it in reduction of the mortgage debt, does not pro tanto discharge the mortgage,—a proposition so revolting to common sense, that there would be difficulty in believing that such could be the state of the law. Another observation is, that when there was so large a sum as 14,000*l.* or 15,000*l.* payable in

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respect of the slave compensation-money, so far were the Plaintiffs from being advised, that they ought to require the production of the grosses, that Mr. *Willink* was allowed to receive the money without any inquiry being made respecting the grosses. So, with regard to all the other mortgages, though the Plaintiffs have been privy to the fact, that Mr. *Willink* had been dealing with and satisfying the other mortgages, and though they are parties to an arrangement founded thereon, they do not appear to have inquired whether the grosses *were in his possession until 1838. Another [*18] circumstance which, in a moral point of view, might justify important conclusions is, that, if the law be as the Plaintiffs suppose, Mr. *Willink* has been, throughout the whole transaction, himself paying off prior mortgages, without seeing that the grosses were in the possession of those to whom he paid them. I must, therefore, ascribe an extraordinary degree of ignorance to the advisers of both parties, if the law be such as the Plaintiffs' argument supposes.

[His Honor then adverted to the correspondence in 1838 on the subject of the grosses (a).]

There are in this case facts appearing which would, I think, enable me either to continue or dissolve the injunction, without violating any rule of this Court. It is impossible to say that Mr. *Willink* has not, in his answer, admitted facts which leave a case for inquiry; and it is impossible to say that the Plaintiffs have not so dealt with this transaction as to justify me in saying I cannot place much reliance,—not on their statements, for on their statements I place the most implicit reliance,—but on their supposition of what the law of Demerara is on the point in question.

I have looked into the authorities, so far as I have been able, but they are very far from being satisfactory.

The course which I think will meet the justice of the case is this,—if the Defendant will consent to give such security as the Master shall approve of, to account for what he shall recover, as the Court may hereafter direct, in case it should be decided that the Plaintiffs are damnified by the payment which they resist by their bill, I will

(a) *Supra*, p. 2.

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dissolve the injunction. If not, I will continue the injunction, upon the Plaintiffs paying the money into Court, and consenting to an immediate reference to "inquire whether there are any and what grosses existing, and, if they are not in the Defendant's possession, for what purpose it is that the Court in Demerara requires the indemnity. If both parties decline these terms, the injunction must be dissolved.

Luccraft v. Hite. L. C. 19th December, 1785. Time for Defendant's redeeming the mortgaged premises enlarged, &c. ; and it being alleged, that some of the title-deeds and writings have been lost, the Master to inquire whether any of such title-deeds and writings are lost, or are not in the power of the Plaintiffs, or either of them, to produce; in which case the Master to settle how and in what manner the Plaintiffs can make the Defendant an effectual title to the said mortgaged premises by way of re-conveyance, or settle what indemnity will be necessary to be made to the Defendant in respect to the loss or non-production of such deeds and writings, and for the better discovery, &c. Reg. Lib. B. 1785, fo. 203.

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The testator gave certain pecuniary legacies to his daughters respectively, one half to be invested and secured from the control of any husband, the interest to be paid to them in the meantime, and the principal disposed of as they should direct, to their issue; and in case they die without issue, he gave the principal among the survivors of his children in equal shares:—*Held*, that the first bequest was limited to issue living at the death of the children, and that the gift over on failure of issue referred to the same objects.

Gift of a residue of real and personal estate to trustees to sell, get in, pay and divide the money arising therefrom, unto and equally among the testator's children, so soon as the youngest should attain twenty-one,—the daughter's shares to be invested and secured, and the interest paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child, the share to be divided amongst the survivors of the testator's children equally, and in case of the death of any of his children leaving lawful issue, the share the parent would have been entitled to have:—*Held*, that the residuary share of a child, who attained twenty-one, and died before the time of division, passed to his representatives [1].

[1] Where the words in a will are in the present tense, but the direction for the payment is in the future, the fair import of the language is that there is a present

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That no child, who did not attain twenty-one, was intended to take any interest in the residue. *Sembla.*

That the word "survivors," in the residuary clause, must be construed in its natural sense, and not as importing "others," and that this construction of the word in one part of the will must govern the construction of the same word in the other parts.

That the gift of the part or share of a parent dying leaving issue, to such issue, applied both to the original and accruing shares of the residue, but not to the particular legacies.

THOMAS LEEMING, by his will, after bequeathing certain legacies, gave to each of his children, *Sarah*, *James*, [*15] *Maria*, *Joseph*, *Frances*, and *Henry*, £1000 each, to be paid respectively on their attaining the ages of twenty-one, excepting to such of them as were girls, in which cases he ordered that one-half part should be secured from the control of any husband with whom they might intermarry, the interest in the meantime to be paid to them, and the principal disposed of, in such manner as they might direct, to their issue; but, in case they should die without issue, he gave the principal among the survivors of his children in equal proportions. The testator then gave, devised, and bequeathed to his son, *Thomas Leeming*, *John Sherratt*, and *Thomas Belshaw*, whom he appointed his executors, all his freehold property, and also all the residue of his personal estate; and he declared the trusts thereof as follows:—"To sell and dispose of my freehold property, and to collect and get in all my personal property, and to pay and divide the money arising therefrom, so soon as my youngest child shall attain the age of twenty-one, unto and equally amongst my children, share and share alike; but I direct one-half of the shares of such of them as are daughters shall be placed out at interest, and be secured from the control of any husband with whom they may intermarry, the interest in the meantime to be paid to such daughter,

gift, to be paid thereafter. A direction in a will for a division of an estate among several persons, by the executor, is equivalent to a direction for the payment to the legatee, of their respective shares, in such case the interest is vested, and is transmissible. *Tucker and Wife v. Ball*, 1 *Barbour's Sup. C. R.* 94. See *Packham v. Gregory*, 4 *Hare*, 396. *Salisbury v. Petty*, 3 *Hare*, 86. *Watson v. Hayes*, 5 *Myl. & Cr.* 125. 132.

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and the principal to be disposed of, in such manner as she may direct, amongst her children, if any; but, if there be no children, then such share to be divided equally amongst the survivors of my children; and, in case of the death of any of my children, leaving lawful issue, I direct and give to such issue the part or share the parent so dying would have been entitled to have."

The testator died in 1807. Nine of his children survived him, and attained twenty-one years of age, namely, *John* [*16] died (who without issue before *Henry*, the youngest, attained twenty-one), *Sarah* (who died without issue after *Henry* attained twenty-one), *Thomas*, *Elizabeth*, and *Frances*, (who died leaving issue after *Henry* attained twenty-one), and *James*, *Joseph*, *Maria*, and *Henry*, living at the institution of the suit.

The suit was instituted for the administration of the testator's estate, and to obtain the declaration of the Court upon the interests of the surviving legatees, and the representatives of those who were dead. On further directions,

Mr. Temple, *Mr. Sharpe*, *Mr. Walker*, *Mr. Bacon*, *Mr. Bayshawe*, *Mr. Maylne*, *Mr. Elderton*, and *Mr. Taylor*, appeared for the several parties.

VICE-CHANCELLOR :—

Four questions have been raised in this case. First, on the meaning to be attached to the expression, "in case they die without issue." The second, whether the residuary share of *John Leeming*, who died in the year 1811, without leaving lawful issue before the youngest child of the testator attained twenty-one years of age, having himself attained twenty-one, was transmissible to his representative, or is undisposed of by the will. The third question, on the meaning of the word "survivors;" and the fourth question, what parts of the testator's property are affected by that clause of the will in which, "in case of the death of any of his children leaving lawful issue," he gives "to such issue the part or share the parent so dying would have been entitled to have."

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Upon the first question my opinion is, that the words "in case they die without issue," must be construed ["17] with reference to the issue before spoken of; as if the words were "in case they die without *such* issue:" *Ellicombe v. Gompertz* (a). I am further of opinion that the issue before spoken of does not mean issue indefinitely: *Target v. Gaunt* (b),—a construction which is fortified by the subsequent parts of the will, in which it is manifest from the words themselves, that an indefinite failure of issue was not the event the testator contemplated.

Upon the second point I think that the share of the residue of *John Leeming* was transmissible to his representatives.

The argument against this construction may be thus stated:—It was said that the gift of the residue is future,—that there is no gift of such residue, except in the direction to pay, and that it is a settled rule, in the construction of wills relating to personal estate, that, where a legacy is given at a future time, and there is no gift of the legacy, except in the direction to pay, the legatee can claim nothing unless he is living at the time when the legacy becomes payable [1]. That the Court has, in many cases, expressed itself very nearly in this manner, I do not deny; but I am satisfied that I should be misapplying the rule intended to be expressed by the Court in such

(a) 3 Myl. & Cr. 127, and see the cases there cited.

(b) 1 P. Wms. 432.

[1] If a testator leaves a legacy absolutely as regards his estate, but restrains the mode of the legal enjoyment of it, to secure certain objects for the benefit of the legatee, on the failure of such object, the absolute gift prevails; but if there is no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms a part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only to the particular purposes; in the former, the purpose is the benefit of the legatee as to the whole amount, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee. The intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the terms of the will, and not from there being words used which, standing alone, would constitute an absolute gift. *Lassense v. Tierney*, 2 Hall & Twells, p. 125. *Scawin v. Watson*, 10 Beavan R. 200. *Gomports v. Gomports*, 2 Phillpotts R. 107. *Campbell v. Brownrigg*, 1 Phillpotts R. 301. *Winckworth v. Winckworth*, 8 Beavan, 576. *Hume v. Hume*, 9 Simons Rep. 644.

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cases, if I were to hold that *John's* share of the residue was not transmissible to his representatives, only because he died before the testator's youngest child attained twenty-one. The rule of construction referred to (as I understand it) is simply this:—Courts of Equity, in the construction of wills relating to personal estate, follow the rules of the civil law. By that law, when a legacy [*18] is given absolutely, and the payment is postponed to a future definite period, the Court considers the time as annexed to the payment and not to the gift of the legacy, and treats the legacy as debitum in præse ti solvendum in futuro. This rule being established, a question was made, whether, in the simple case of a direction to pay a legacy at a future period, without any gift of the legacy independently of that direction, the legacy would be transmissible to the representatives of the legatee dying before the time of payment; and the Court, in that simple case, has sometimes considered the time of payment as annexed to the legacy itself, and not merely to the payment of it. But the Court, in so deciding, has not, I conceive, intended to decide that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, was less favourable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but, in fact, has intended only to assimilate those cases to each other, and to distinguish both from the class of cases to which I first referred, in which there has been a gift of the legacy, and also a direction to pay at a future definite time distinct from that gift.

I have examined most of the reported cases upon the subject, and am confirmed in the opinion I entertained during the argument, that the question is one of substance and not of form. The question in all the cases has been, whether the testator intended it a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question has been sought for out of the whole will, and not in particular expressions only like those relied upon in this case. In *Monkhouse v. Holme*(a), Lord *Loughborough* states the rule generally,—"If the

(a) 1 Bro. C. C. 298.

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day is certain, it is vested ; but where uncertain, the question will be,—‘ Whether it is in the nature of a condition,’ for, if it is conditional, then in the very nature of the thing the time is annexed to the substance of the gift ; as, in the case of marriage, of puberty, or of any other situation of life, when the arrival of the time is a condition, without which the testator would not have made the gift.” And in *May v. Wood* (a), (a case which is unimpeached in principle), the *Master of the Rolls* says,—“ All the cases establish this principle, that where the time is mentioned as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift ; but, if it appears that the testator intended it as a condition precedent upon which the legacy must take place, then, if such condition or contingency does not happen, the gift never arises.” In *Barnes v. Allen* (b), the testator gave the residue of his estate to his wife for life, and afterwards to their children, and, if she should die leaving no child or children at the time of her death, he willed that his trustees should transfer the securities, in which his estate should then be vested, to his two brothers ; and, if either brother should die without issue, to the survivor. Both brothers died in the lifetime of the wife of the testator ; but it was determined that this substituted interest of the brothers was transmissible to their representatives, although there was no gift to them, except in the direction to transfer. So, I conceive, if a leasehold house were bequeathed to trustees for A., with a proviso, that, if B. returned from Rome within ten years, the trustees should assign the premises “to C., such interest as C. took in the [*20] premises would be transmissible to his representatives, although he should die within the ten years, provided B. returned from Rome within that period (c). In *Saunders v. Vautier* (d), the testator gave to his executors and trustees (the same individuals)

(a) 3 Bro. C. C. 472.

(b) 1 Bro. C. C. 181.

(c) See *Fearne, Conting. Rem.* 555. ed 7.

(d) 1 Cr. & Phil. 240.

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all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue thereon, until *Daniel Wright Vautier* should attain the age of twenty-five years, and then to pay or transfer the principal of such East India Stock, together with such accumulated interest and dividends, unto the said *Daniel Wright Vautier*, his executors, administrators, or assigns absolutely. Under this bequest the Court gave *Daniel Wright Vautier* maintenance out of the fund during his minority, and, upon his attaining twenty-one, ordered the whole fund to be transferred to him. It is true that, in that case, the *Lord Chancellor* noticed special circumstances which he thought sufficient to decide the question; but he expressed a clear opinion upon the case, independently of those circumstances, and the special circumstances he relied upon with respect to the particular legacy in that case, apply by law to a residuary clause without being expressly mentioned. The reasoning of Sir *William Grant* in *Hanson v. Graham* (a), in commenting upon *Boraston's case*, *Manfield v. Dugard*, and *Doe v. Lea*, accords with, and supports the view I take of the principle of this class of cases.

In all the cases which may be supposed to support the Plaintiff's argument (against the interest of *John* in the residue [*21] to his representatives), the Court has laboured to shew that the future interest upon which the question arose was, by the terms of the will, contingent. As a legacy to a person "at" the age of twenty-one, or "when" or "if" the legatee attained that age, or upon some event which did not happen,—reasoning which would have been superfluous, if the mere circumstance that the gift was future, and that it was given under the form of a direction to pay, had furnished a simple rule of decision. The case of *Thicknesse v. Liege* (b) falls under the above observation. Of that case it is said (c) (and I think correctly):—"The ground for the final decision seems to have been the clear intention of the testator that all the limitations of the beneficial interest in his residuary

(a) 6 Ves. 246, 247.

(b) 3 Bro. P. C. 365, 373, Tom. ed.

(c) *Roper, Treatise on Legacies*, Vol. I. p. 508.

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property should be contingent, and no person take a vested interest in it before the right of enjoyment accrued."

The question, I am now bound to consider is, whether (excluding the cases in which there has been a gift of the legacy distinct from the direction for payment) the testator has made the shares in the residue of such of his children as should die without leaving issue contingent upon their surviving the time when the youngest should attain twenty-one. In considering this question, I may be bound to advert to the circumstances, that the gift of the residue is future, and that there is no gift of such residue, except in the direction for payment; but they are only circumstances, and certainly not conclusive. The persons to whom the residue is given are all the testator's children as tenants in common; and the clause, which afterwards substitutes the issue of a deceased child for the parent dying leaving lawful issue, shews, or *strongly [*22] tends to shew, that the persons to whom, in the first instance, the residue was given meant all the testator's children who should survive him, and not all those only who should be living when the youngest should attain twenty-one. Then the residue is given to trustees. For whom are they trustees? Obviously for all the children of the testator who should survive him, except so far as he should otherwise direct. Of what are they trustees? The income of the property between the death of the testator and the time of dividing the residue would accumulate for the benefit of those to whom the residue in terms is eventually given. The trustees, therefore, are trustees of the residue, and of the interim profits thereof, for all the testator's children (except so far as he has afterwards substituted others for those children) upon the happening of an event which in fact has happened, namely, the youngest child attaining twenty-one. Again, the testator directs, that, in case any of his children dies leaving lawful issue, that issue shall take "the part or share the parent so dying would have been entitled to have." The words "would have been entitled to have" were relied upon in argument, as shewing that the testator himself supposed the parent spoken of to have lost his share in the residue in the event he provides for. But I do not think those words are so full of meaning as that argu-

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ment supposes. I think the clause is nothing more than the common clause of substitution of one legatee for another in the event spoken of. The substitution is not general. It is confined to the case of a child of the testator dying leaving lawful issue, and does not extend to the case which has happened of the child of the testator dying not leaving lawful issue. If the will had not contained the clause of substitution, and one or more of the testator's children had died leaving lawful issue before the youngest attained twenty-one, the argument in favour of the "legacy being transmissible would have been irresistible; and if the bequest of the residue would, in the absence of the clause of substitution, have given to *John* an interest transmissible to his representatives, I do not understand why the clause of substitution can alter the construction of the will in a case to which that clause will not apply. The circumstances which, in cases of residuary gifts, the Court has relied upon for preventing an intestacy, as in *Booth v. Booth* (a), and in *Love v. L'Estrange* (b), were certainly not stronger than occur in this case. *Love v. L'Estrange*, I may observe, is approved of by Sir *William Grant* in *Hanson v. Graham*, and by Lord *Cottenham* in *Saunders v. Vautier*. There is nothing of improbability in the supposition that the testator intended his children to take absolute interests in the residue, except in the event of their dying leaving issue before the period of division. If there is any case which decides, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happens, does not confer upon those children an interest transmissible to their representatives merely because they die before the event happens, I am satisfied that case must be at variance with other authorities.

In the observations I have made upon this case, I have noticed the fact that *John Leeming* had attained twenty-one, for this reason:—The testator having postponed the division of the residue until his youngest child attained that age, I think no child, who did not attain that age, could have been intended to take a share therein. But

(a) 4 Ves. 399.

(b) 5 Bro. P. C. 50, Tom. ed.

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this is consistent with the proposition, that all who lived to that age should participate in the residue as soon as the youngest child, who should "attain that age, had reached it, which [*24] is the attention I ascribe to the testator. I think, in fact, the case more analogous, in principle, to such cases as *Barnes v. Allen* than to such as *Thicknesse v. Liege*, in which the Court has discovered a manifest intention that the gift of the residue should be for all purposes contingent upon the legatee's surviving the period of division.

Upon the third point, I think the word "survivors" must be understood in its natural sense, and not in the sense of "others" in which it has sometimes been construed. In *Davidson v. Dallas* (a), Lord Eldon's language obviously imports that the word "survivors" is to be construed in its natural sense, unless the will itself shews that it was used by the testator in a different sense, and *Crowder v. Stone* (b), is to the same effect. In *Barlow v. Salter* (c), the dictum of the Court tends rather to treat the word as having a technical meaning (that of "others") impressed upon it in practice. According to *Davidson v. Dallas*, one reason for construing "survivors" to mean "others" has been to take in all persons who should be born before the period of distribution. In other cases, the object suggested has been to prevent a family losing the provision intended for it by the death of a parent leaving children. The reason of the former of these cases could not occur here, in the case of the residue, because the testator's own children are of the legatees of that residue. And, according to the construction that I feel myself at liberty to put upon that clause in the will which, in certain cases, substitutes the issue for the parents, I think the testator has guarded against the second inconvenience; and, so far at least as the residue is concerned, I think, "that, in the residuary [*25] clause, the word "survivors" must be construed in its natural sense, and that this construction of the word, in one part of the will, must, in this will, determine its construction in the other

(a) 14 Ves. 576.

(b) 3 Russ. 217.

(c) 17 Ves. 479.

 1841.—Clayton v. Meadows.

part also. With respect to the cases of *Cripps v. Walcott* (a), *Hoghton v. Whitgreave* (b), and other cases of the same class which were cited during the argument, they appear to me to raise a question distinct from that in the case before me.[1]

I see nothing in the words of the will to prevent me from applying the clause of substitution both to an original share of the residue, and to a share in the residue of the daughter, who died without issue, which is the question involved in the fourth point; and the intention of the testator will best be satisfied by my so applying that clause. But I cannot extend that substitutionary clause to the particular legacies.

[*26]

*CLAYTON v. MEADOWS.

1841: Nov. 8, 10, 15. 1842: May 5, 23, June 6, Dec. 21. 1843: Jan. 25.

In a suit for tithes, a district consisting of 370 acres land, within the ambit of, and surrounded by, the parish, held, after the trial of an issue 'at law, to be extra-parochial, and the bill dismissed with costs.

Where a plea to the bill is filed, and the plea is overruled, with liberty to amend, and the amended plea is put in and allowed, the Defendant is not entitled to the costs of correcting his own mistake, but is entitled to the costs which he would have had if the plea which was allowed had been the plea which was first filed.

Under a general order of taxation, the Master will without any special direction, exercise a discretion as to taxing the costs of informal proceedings.

A BILL for tithes, by rector of the parish of *Cottingham cum Middleton*, in the county of *Northampton*. The Defendants were, originally, *Meadows*, *Sir Arthur de Capel Brooke*, and the *Earl of*

(a) 4 Madd. 11.

(b) 1 Jac. & W. 146.

[1] The more recent decisions in England favor the doctrine of a strict construction, or natural sense of the word "survivors," unless there is an indication, in the context, of an intention to use the word in the sense of "other." See Jarman on Wills, vol. ii. p. 735. Spence's Equity, vol. i. p. 541, note l. *Slade v. Parn*, vii. Jurist 102. Mr. Jarman says: "At all events, the course of the recent decisions in the English Courts of Equity renders it highly probable that the strict construction of the word 'survivor' will eventually be adopted, though with a readiness to yield to the slightest indication in the context, of an intention to use the word in the sense of *other*." 2 Jarm. on Wills, 736.

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Winchelsea. The lands, on which the matters alleged to be titheable arose, had been part of *Rockingham Forest*, and were the property of the Crown and its grantees. It was inclosed and disafforested in 1837, under an act of parliament.

As against the *Earl of Winchelsea*, who filed his plea, which was afterwards amended and allowed, the bill was dismissed with costs.

Sir *Arthur de Capel Brooke* rested his defence to the suit on the alleged non-payment or render of tithes for sixty-three years, and on the act 2 & 3 Will. 4, c. 100 (a).

The defence of *Meadows* was, that the lands in his occupation, called *Bennetfield Lawnde* or *Lawne*, were not within the parish of which the Plaintiff was rector.

Mr. *Temple* and Mr. *Coleridge*, for the Plaintiff.

Mr. *Sharpe* and Mr. *Parry*, for the Defendant, *Meadows*.

Mr. *Simpkinson* and Mr. *Roupell*, for Sir *Arthur de Capel Brooke*.

*THE VICE-CHANCELLOR said, that the Defendants [*27] had not carried back the proof of non-payment or non-render the of tithes for the sixty-three years expressed in the statute ; and, inasmuch as the last section (a) precluded the Court from supplying the proof by presumption and the Defendant, Sir *Arthur Capel de Brooke*, had made no other defence, a decree for tithes in kind must be pronounced against him.

VICE-CHANCELLOR :—

The Plaintiff, the rector of *Cottingham cum Middleton*, prays an account of tithes arising on lands in the occupation of the Defendants. At the close of the argument, I expressed a decided opinion that the

(a) See *Salkeld v. Johnston*, Vol. I. p. 196.

(b) 2 & 3 Will. 4, c. 100, s. 3.

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Plaintiff had established his case against Sir *Arthur Brooke*, who had relied entirely upon the statute 2 & 3 Will. 4, c. 100; and I made a decree against him accordingly. I was equally clear that the Defendant, *Meadows*, had failed in making any valid defence, so far as his case depended upon that statute. The Defendant *Meadows*, however, insisted by his answer, that the lands he occupied were not within the parish,—and I thought he was entitled to an issue to try that question; but before directing such an issue, I was desirous of looking more attentively than I previously had done into the cases in which lands lying, like these, within the ambit of a parish, and wholly surrounded by the lands of that parish, have been deemed to be extra-parochial, that I might the better judge of the probable utility of the issue. I have found no reason, from the perusal of those cases, to alter my opinion. The lands of the Defendant were formerly part of a royal forest, known as [*28] *Rockingham Forest* and *constitute a district called *Bennefield Lawnde* or *Lawn*, in quantity about 370 acres.

Neither the past history, nor the present minuteness of this district, affords any inference against its exclusion from the neighbouring parishes. *Blackstone*, in tracing the ecclesiastical division of the country into parishes, thus describes the places which were omitted in that general distribution :—"But some lands, either because they were in the hands of irreligious and careless owners, or were situated in *forests* and desert places, or for other now unsearchable reasons, were never united to any parish, and, therefore, continue to this day extra-parochial (a)." Several cases in the books shew that lands, not exceeding *Bennefield Lawnde* in dimensions, and distinguished by no peculiar characteristics, have been admitted to be extra-parochial. In case of *The Parish of Denham v. Dalham*, in *Suffolk* (b), *Southwold*, consisting of no more than two houses and 300 acres of land, was proved to be extra-parochial, although it did not come within the denomination of a township, or *ville de pluribus mansionibus et vicinis*. In *Stoke Prior v. Manor of Grafton* (c), *Grafton*, formerly a capital messuage, with three

(a) Comm., Vol. L, p. 118.

(b) 1 Str. 1004.

(c) Id. 1071.

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lodges in the park, a seat of the *Earl of Shrewsbury*, but afterwards converted into five houses and farms, was shewn to be extra-parochial. In *The King v. The Inhabitants of Standard Hill* (a), a close within the precincts of the castle of *Nottingham*, which had no dwelling-houses upon it, and was let out in gardens until 1807, appears to have been admitted to be extra-parochial, though not a vill. The lands within the monastery of *Routon Abbey*, in *Staffordshire*, containing 400 or 500 acres, a farm-house, and two cottages (b), are another instance of a small rural [*29] district in the same situation, although that, like the colleges and halls of the universities (c), and some of the inns of court (d), is more capable of explanation. From the cases I have adverted to, it also appears that no special circumstances, and no evidence more conclusive or stringent than reputation, has been deemed necessary to establish the fact of lands being extra-parochial. And the stat. 17 Geo. 2, c. 37, provided, that, in case of dispute in what parish improved wastes and marsh lands lie, magistrates may determine to what parish they shall be rated, but not so as to affect boundaries.

The Defendant, however, had not so made out his case as to entitle him to a decree dismissing the bill on the ground that his lands were not within the parish; and I hesitated at giving him an opportunity of trying the question on an issue, because not only had he failed in proving his case, but he had not had recourse to all the means of proof within his reach. He had not examined witnesses as he might have done, to establish the reputation existing upon the subject. And, where the case of a party fails in equity from his own neglect, my opinion is, that a court of equity cannot well act too strictly in making a decree according to the evidence before it at the hearing. And, if, in this case, the Plaintiff had abstained from going into evidence upon the subject, I should certainly have

(a) 4 Man. & Sel. 378.

(b) *King v. Inhabitants of Routon Abbey*, 1 T. R. 207. See also *Rex v. Inhabitants of Rufford*, 1 Str. 512.(c) *Queen v. Cambridge Gas Light Company*, 6 Ad. & Ell. 75.

(d) 4 Man. & Sel. 382.

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taken that course, and made a decree against the Defendant *Meadows*. But the Plaintiff, who asks relief at the hands of the Court, has called many witnesses to speak to the reputation in the parish respecting the lands in the occupation of *Meadows*: and his [*30] witnesses, though called for that very purpose, *word their depositions in a way which leaves it at least doubtful whether their testimony is not evasive. This, coupled with the evidence shewing the repeated attempts which the parish has made to treat *Bennefield Lawn* as parochial,—the resistance to those attempts on the part of the occupiers of the *Lawn*,—the absence of evidence, on the part of the Plaintiff, to shew that these attempts of the parish have ever succeeded,—and the direct testimony that, upon the last occasion of the attempt being made prior to the institution of this suit, namely ten years ago, the occupiers of the *Lawn* resisted, and that the parish actually gave up the demand for a poor rate, and restored the distresses they had taken,—these circumstances combined have strongly inclined me to put the matter in a further train of investigation. And I have been determined so to do by the additional consideration, that, under the late act for the commutation of tithes (a), my decree, in favour of the Plaintiff, might be attended with more permanent consequences than would have attended a similar decree prior to that act.

It may deserve consideration by the Defendant, whether, if *Bennefield Lawn* be extra-parochial, and the tithes, therefore, the property of the Crown, prior to the alienation in 1832, the title to those tithes may not be in Lord *Winchelsea*.

The issue was tried at the *Northamptonshire* Spring Assizes for 1842, before Mr. Justice *Williams* and a verdict for the Defendant, determining that *Bennefield Lawn* was extra-parochial.

[*31] *Mr. *Temple*, Mr. *Coleridge*, and Mr. *Whitehurst*, on behalf of the Plaintiff, moved for a new trial; arguing,

(a) 6 & 7 WILL. 4. c. 71.

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that the learned Judge, in his direction to the jury, had misled them, by improperly receiving and giving undue weight to evidence adduced by the Defendant, and not giving due weight to evidence produced by the Plaintiff, and that the verdict was against the weight of evidence.

Mr. Sharpe, Mr. Parry, and Mr. Waddington, contra.

[It did not appear that any objection had been made at the trial to the reception of the evidence now objected to.]

On the immediate point of the parochiality of the lands, it was suggested that the non-payment of the parochial rates, since 1777, was explained by the reported case of *Jones v. Maunsell* (a), in which the parish had failed to establish the rateability of herbage and pannage on *Bennefield Lawn* and which had rendered the present question unimportant until the lands were disafforested. On the other hand, shewing the legal rateability of herbage and pannage on lands occupied by private persons, the following cases were cited:—*Lord Bute v. Grindall* (b); *The King v. Terrott* (c); *The King v. Watson* (d); *Rez v. Mayor of Sudbury* (e). And, on the question of directing a new trial,—*Pemberton v. Pemberton* (f); *Barker v. Ray* (g); *Tatham v. Wright* (h); *Gibbs v. Hooper* (i) *Slaney v. Wade* (k). On the small weight [*32] which should be given to evidence of reputation: *Weeks v. Sparke* (l).

The motion was refused. Costs reserved.

The cause came on for further directions, and the bill, as against the Defendant *Meadows*, was dismissed with costs.

The petition of the Plaintiff, complaining of the certificate of

(a) 1 Dougl. 302.

(c) 3 East, 506.

(f) 11 Ves. 52.

(i) 2 Myl. & K. 533.

(b) 1 T. R. 338; S. C. Bott's Poor Laws, p. 185.

(d) 5 East, 480.

(g) 2 Russ. 63.

(k) 1 Myl. & Cr. 358.

(e) 1 B. & C. 389.

(h) 2 R. & Myl. 1.

(l) 1 Man. & Sel. 687.

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taxation of the costs of the *Earl of Winchelsea and Nottingham*, of his original plea, which was not allowed, but which he was permitted to amend (a), amounting to 22*l.* 9*s.* 4*d.*, out of his costs, taxed at 52*l.* 6*s.* 10*d.*; and praying for liberty to except to the certificate of costs, or that it might be referred back to Master *Mills*, the taxing Master, to whom the taxation of costs in the cause was transferred, to review the certificate, and that the Master might be directed to retax the said costs, and disallow the items thereof therein set

(a) *Supra*, p. 26.

(b) The case and certificate were as follows:—

CLAYTON *v.* MEADOWS and Lord WINCHELSEA, (Exchequer cause.)

May, 1838—Bill for account of tithes. Plaintiff, rector.

12th October, 1838—Lord *Winchelsea* files a plea.

3rd May, 1839—Plea argued. Order that the Defendant, the Earl of *Winchelsea* be at liberty to amend his plea, and put in an answer.

28th November, 1839—Amended plea and answer filed.

18th January, 1840—Amended plea and answer filed.

19th January, 1840—amended plea argued and allowed.

5th March, 1840—Upon the Plaintiff's motion that he might be at liberty to dismiss his bill against Lord *Winchelsea* with costs, it was ordered as prayed, and reference to Master *Spranger*.

11th August, 1842—In consequence of Mr. *Spranger's* death, and the transfer of the Equity Exchequer to Chancery, Master *Richards* certified that he had taxed Lord *Winchelsea's* bill at 52*l.* 6*s.* 10*d.*

The above costs include all Lord *Winchelsea's* costs from the beginning, i. e. costs of original plea, of arguing same, attending judgment thereon—instructions for amended plea, &c. &c. &c.

The Plaintiff objects, that Lord *Winchelsea* ought not to have been allowed the costs of, and occasioned by, filing the original plea, which the Court held to be insufficient, and which he was allowed to amend. The question is, whether the costs objected to have been allowed?

There is no special rule upon the subject in the Exchequer practice; and my desire is to be informed of the practice which would be allowed in Chancery.

We beg leave respectfully to certify.

That, in taxing the costs in question, under the order to dismiss, we should not have allowed to the Defendant any costs incurred in correcting his own mistake, but should have taxed the costs, as if he had filed in correct form, in the first instance, the plea and answer on which the Court ultimately decided in his favour.

JOHN WAINWRIGHT,

PHILIP MARTINEAU,

R. B. FOLLETT,

W. R. BAYNES,

RICHARD MILLS,

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forth, amounting to 22l. 9s. 4d., occasioned by the filing of the said plea.

Mr. *Temple* supported the petition; and urged that the costs complained of were occasioned by the error in pleading of the *Earl*, and that he should have only the costs he would have received, if the first plea had been right.

Mr. *Sharpe* and Mr. *Roupell* contra.

A case was sent to the Taxing Masters for their certificate (a).

"THE VICE-CHANCELLOR said he had not doubted [*33] that, where the costs of the proceedings in the cause were directed to be taxed, the Master might look into the propriety of the proceedings which had been taken, to determine the costs to be allowed: thus, if the same solicitor, appearing for several Defendants, had given a number of different briefs for parties in the same interest; or if *he had taken several [*34] proceedings to do an act which might have been effected by one step,—the Master would reduce the costs thus occasioned. In some cases the practice regulated the costs of the proceeding without any special order. In others the costs were provided for by special order at the time. His doubt had been with regard to a third class of cases,—where the Court had acted upon an informal proceeding, and thereby made it a proceeding in the cause,—whether the Master could then do otherwise than allow the costs of such proceeding, under the order to tax generally. It appeared that there was no special rule in the court of Exchequer on the subject (a). If an application had been made at the time that leave was given to amend the plea, that the Plaintiff might be indemnified against the costs, the Court, as a matter of course, would have imposed upon Lord *Winchelsea* the costs of correcting his mistake. No such order was made,—the bill was dismissed with costs, and

(a) See General Order, 12th October, 1841; Beavan's Ord. Can. 180.

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the informal proceeding had been thus upheld as a proceeding in the cause, and he had thought the Master had no discretion but to tax the costs. He was glad to find that the Master exercised a larger discretion in such matters than he had supposed. It appeared, however, that the Master would not tax off more than 16*l.* 10*s.* 8*d.* and it was for the Plaintiff to consider whether that deduction was worth pursuing at the expense of further litigating the subject,—the costs of which litigation, under the circumstances, would fall upon the Plaintiff.

Mr. *Temple*, on behalf of the Plaintiff, declined to proceed farther on the subject.

[*35]

*BOURNE v. BOURNE.

1842: 6th and 28th June.

Real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to re-convey the estate to the mortgagor, his heirs and assigns, but if default should be made in such payment, then that the trustee should enter into possession of the premises, and, at his discretion, sell the same, and pay over the residue of surplus (after payment of the debt, interest and costs) to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the Plaintiffs for life, with remainder over in tail:—*Held*, that there was no conversion, but that the surplus proceeds passed by the devise as real estate.

WILLIAM BOURNE being seised in fee-simple in possession of certain hereditaments and premises at *Shrawley*, in the county of *Worcester*, subject to a mortgage to *William Dunn*, executed certain indentures of lease and release, dated the 13th and 14th of June, 1822,—the latter being made between *W. Bourne*, of the first,—*W. Dunn*, of the second,—*S. Good*, of the third,—*J. Southall*, of the fourth,—and the trustee of a term of the fifth, part, whereby, in consideration of 1000*l.* then advanced and paid to *W. Bourne* by *S. Good*, out of

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which the mortgage to *W. Dunn* was discharged, *W. Bourne* and *W. Dunn* conveyed and released the said hereditaments unto and to the use of *J. Southall*, his heirs and assigns, upon trust, in case *W. Bourne*, his heirs, executors, administrators, or assigns, should pay *S. Good* the sum of 1000*l.* and interest at 5 per cent, on the 14th of June then next, to permit *W. Bourne* to retain possession of the said hereditaments, and receive the rents thereof, until the said 1000*l.* and interest should become payable, and, in case the same should be then discharged, to re-convey the said hereditaments to *W. Bourne*, his heirs and assigns; but, in case default should be made for the space of three calendar months in payment of the said 1000*l.* and interest, or any part thereof at the time aforesaid, then upon trust that *J. Southall*, his heirs or assigns, should thereupon enter into possession of the said hereditaments, and should, at any time thereafter, at his or their discretion, sell and dispose of the said hereditaments and premises as therein mentioned, and, out of the proceeds of such sale, in the first place, pay [*36] and retain all costs and expenses attending the sale or otherwise to be incurred in execution of the trusts thereby declared, and, in the second place, to pay and satisfy to the said *S. Good*, his executors, administrators, or assigns, the said sum of 1000*l.*, and the interest thereof, or such parts of the said principal and interest monies as should be then due and unpaid, together with all costs and expenses (if any) attending any non-payment thereof, and, after all the aforesaid principal and interest monies, costs and expenses, should be wholly paid and satisfied, then in trust to pay over the residue or surplus of the said trust monies to arise by the means aforesaid unto the said *W. Bourne*, his heirs, executors, administrators, or assigns, for his or their own benefit. In November, 1826, *W. Bourne* made a deed of further charge on the hereditaments, to the amount of 150*l.*, to *S. Good*. In June, 1831, *W. Bourne* died, having, by his will, duly executed to pass freehold estate at *Omberville* for the payment of his debts, expressly including the monies due on the mortgage of his said hereditaments at *Shrawley*, and having devised the said hereditaments unto *W. Holdsworth* and the Defendant, *R. B. Bourne*, for a term of ninety-nine years, in trust

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to permit the testator's wife, *Mary Bourne*, one of the Plaintiffs, to receive the rents and profits for her life, and, from and after her decease, to the use of his son, the Defendant, *Robert Bourne*, and his assigns for his life, with remainder to his issue in tail,—remainder to the testator's daughter, the Plaintiff, *Jane Bourne*, and her assigns for her life,—remainder to her issue in tail,—remainder to the Defendant, *R. B. Bourne*, his heirs and assigns.

The Defendant, *R. B. Bourne*, disclaimed the estate thereby devised to him. In June, 1834, *S. Good* assigned [*37] "his mortgage debt of 1150*l.* to *Samuel Higgins*, and the hereditaments comprised in the mortgage were conveyed to the Defendant, *Robert Higgins*, upon and subject to the powers and provisos of the release of the 14th of June, 1822. *Robert Higgins*, in July, 1837, under the said trusts for sale, sold the mortgaged hereditaments, the proceeds of which, after paying thereout the debt and costs, left a surplus of upwards of 1000*l.* in his hands. The Plaintiffs, the widow and daughter of the testator, filed their bill, praying a declaration that the said balance of the purchase-money which arose from the sale of the said hereditaments was subject to the devises and limitations in the will, and that the same might be secured, and the interest paid accordingly. The bill stated, that there was no personal representative of the testator in existence.

The Defendant, *R. Higgins*, by his answer, submitted to pay the balance as the Court should direct.

Mr. Sharpe and *Mr. Perry*, for the Plaintiffs.

Mr. Cameron, for the Defendants *R. B.* and *R. Bourne*.

Mr. Girdlestone and *Mr. Piggott*, for the Defendant *Higgins*.

The estate in this case has been converted into personalty, and the Defendant is accountable to the personal representative of the testator, who is not before the Court: *Coote on Mortgages* (a). If the question of conversion were even doubtful, it ought not to be determined in the absence of the party, who, in one aspect, is alone entitled.

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*Mr. *Sharpe*, in reply.

[*38]

The surplus of the estate retains the character which the estate had at the death of the testator: if it had been sold in his lifetime, it would have been personal estate; not having been so, it is real (*a*).

VICE-CHANCELLOR:—

The question is upon the effect of the release of June, 1822. *Bourne* being seised in fee of the *Shrawley* estate, subject to a mortgage to *Dunn*, another person, named *Samuel Good*, advanced money to pay off that charge, and the estate was conveyed to *Southall*, a trustee, in the first place, to secure the sum due to *Good*.

[His Honor stated the terms of the instrument.]

This is merely a charge by way of mortgage: there is no indication of any intention to convert the property from real into personal. If a person charges his real property with the payment of his debts, unless there is a clear indication that it shall be converted out and out, it retains its character of reality, so far as the charge does not extend, until it is actually converted. If the trustee had taken the property with absolute directions to sell and convert it, the circumstances, that the directions had not been carried into effect at the death of the testator, might have been immaterial, and it might have been treated as personalty. But, in this case, there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this estate, and at the discretion of the trustee "to sell it, for the purpose of recovering payment of the [*39] debt for the mortgagee. The direction to re-convey the estate, in case of payment of the mortgage-money, is inconsistent with the notion that there was any intention that the property should be absolutely converted by the effect of the conveyance.

The event, upon the happening of which the trustee might, at his

(a) See cases cited *infra*, p. 39 n.

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discretion, have sold the estate, namely, the default in payment of the mortgage-money, took place in the lifetime of the testator; but the discretion to sell had not been exercised at the time of his death. The consequence is, that the estate passed to his devisees as realty, subject to the mortgage, and the trustee must, therefore, account to the devisees for the surplus proceeds of the sale.

The cases on this subject are all collected and commented upon in the exceedingly able work of Mr. *Dalzell*, on the *Law of Conversion* (a). [1]

[*40]

*BLACKLOW v. LAWS.

1842 : 23d June, 5th July, and 23d December.

Where an estate was directed by the testator to be sold after the death of a certain person, and the sale was made during the life of that person, under a decree, some of the persons interested in the proceeds being infants or not sui juris the Court would not compel the purchaser to accept the title.

The conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser, should be deemed to be waived :—*Held*, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed [2].

The sale took place under a decree. The abstract stated that the person at whose death the sale was to be made, proved the will of the testator, but it did not state the pleadings in the cause, or whether the person was living or dead :—*Held*, that this was not a sufficiently distinct intimation to the purchaser that the time of the sale had, without any sufficient ground, been anticipated.

SAMUEL CHRISTIE, by his will, dated in September, 1830, devised

(a) Page 89. His honor mentioned the cases of *Van v. Barnett*, 19 Ves. 102; *Wright v. Rose*, 2 Sim. & St. 323; *Biggs v. Andrews*, 5 Sim. 424. *Shadforth v. Temple*, 10 Sim. 184.

[1] In cases of equitable conversion, see also *Hopkinson v. Ellis*, 19 Beav. 169; *Simpson v. Ashworth*, 6 Beav. 412; *Cookson v. Reay*, 5 Beav. 22; *Hereford v. Ravenhill*, 5 Beav. 51; *Davies v. Ashford*, 15 Sim. 42; *Ward v. Arch*, 15 Sim. 389; *Flint v. Warren*, 14 Sim. 554.

[2] See *Tanner v. Smith*, 10 Sim. 411; *Morley v. Cook*, 2 Hare, 109, n. a; *Page v. Aclam*, 4 Beav. 269.

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and bequeathed all his freehold and leasehold, and all his personal estate, not specifically bequeathed, to *J. Laws* and two other trustees, as to his estate at *Preston*, in trust for sale as therein mentioned; and upon further trust to receive and take the rents and profits of his freehold estate, situate in *Queen-street* and *Charles-street*, until sale thereof as thereafter directed; and out of such rents and profits and the produce arising from the sale of his said estate at *Preston*, and of his other effects, pay unto the proper hands of his daughter-in-law *Agnes* the sum of 130*l.*, to and for her own sole use and benefit, which he desired might be paid to her, her executors, or administrators, free of legacy duty; then to pay one annuity of 150*l.* into the proper hands of his said wife *Alice* during her natural life, for her own proper use and benefit; and he declared his will to be that such annuity should be paid into the proper hands of the said *Alice*, from time to time as the same should become due, and that the same should not be received by anticipation, and that she should not be at liberty either to raise any money on security thereof, or in any manner to dispose of the same, and if she should so do, such annuity should immediately thereafter cease and be no longer payable. And upon further trust, by and out of the monies to arise from the sale of his said estate at *Preston*, and other effects which should come to the hands of his said *trustees, (as follows), “to [*41] pay one annuity or clear yearly sum of 50*l.*, during the natural life of my said wife *Alice*, into the proper hands of my youngest daughter *Anne* (now the wife of *James Laws*), for her own proper use and benefit.” And the testator directed that so soon after the decease of his wife *Alice* as conveniently might be, his said trustees should, either by public auction or private contract, as they should deem most expedient, sell and dispose of his freehold estate situate in *Queen-street* and *Charles-street* aforesaid, for the best prices that could be reasonably obtained for the same, and out of the proceeds arising from such sale, pay into the proper hands of his daughter *Anne* the sum of 500*l.*, to and for her own sole use and benefit absolutely; and he directed that the residue of his property should be held by his trustees, upon trust to be divided into six equal parts, one part thereof for his daughter *Jane* wife of *J. Davies*, one

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other part thereof in trust for *Sarah Davies* widow, one other part thereof in trust for *Harriet* the wife of *J. Simpson*, one other part thereof in trust for *Eliza*, the wife of *W. Pugh*,—which last-mentioned sixth share he directed should be invested by his trustees, and the dividends and interest paid into the proper hands of his said daughter *Eliza*, whose receipt alone notwithstanding her coverture should be a sufficient discharge for the same; provided that if his said trustees should see occasion they should be at liberty, at any time during the lifetime of his said daughter *Eliza*, to transfer any portion of the bequest made in her favour, not exceeding one half part thereof, for her immediate use, and in that case her receipt alone should be a sufficient discharge to them for the same, notwithstanding her coverture, and that such remaining moiety should remain vested in his trustees, in trust for her, and be subject to such disposition as she should by her last will and testament direct and appoint notwithstanding her present or any future coverture, and in default of appointment the same to be equally divided as therein mentioned,—and one other part thereof in trust, for his said daughter *Anne*. And he declared that the respective receipts of such of them as should be married should be a sufficient discharge, although under coverture. And the testator appointed *Alice* his wife, and the said three trustees, his executrix and executors. The testator died soon after the date of his will, leaving his wife *Alice* surviving him; and his will was proved by *Alice* the widow, and *James Laws*.

The bill was filed in January, 1839, by some of the persons beneficially interested in the residuary estate of the testator, against the executrix and executor, and the other residuary legatees, and prayed the usual accounts of the real and personal estate, and that the trusts of the will might be executed under the direction of the Court.

By the decree, made the 14th of December, 1841, it was declared, that the trusts of the will ought to be performed and carried into execution. An inquiry was directed of what lands and hereditaments and what estate therein the testator had at the date of his will, and of his death; and it was ordered that the real estate, of which the testator was seised at the date of his will, and at the time of his

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death; or such parts thereof as then remained unsold, should be sold with the approbation of the Master.

Under this decree, the estate in *Queen-street* and *Charles-street* were put up to sale in January, 1842, upon printed conditions; and *W. Hains* became the purchaser. By the 8th condition of sale, the purchaser was within twenty-one days next after the delivery of the abstract, to deliver to the vendor's solicitors a statement in writing of such objections to the title "disclosed by [*43] the abstract as he should be advised to take, and every objection not so taken, and communicated within such period, should be deemed waived.

The report of the purchase was made and confirmed. The abstract was delivered to the purchaser's solicitors on the 1st of March. This abstract did not contain any statement of the pleadings in the cause, but stated, amongst other instruments, the will of the testator, and contained in a short line at the foot of the will, as part of the abstract relating to that instrument, these words:—

"Will proved in the prerogative Court of Canterbury, the 24th of June, 1831, by said *Alice Christie*, *James Simpson*, and *James Laws*; said *Thomas Bayley* having renounced probate."

The purchaser's counsel in advising on the title said,—“It should be ascertained by a brief of the pleadings, that all proper parties are before the Court.” The objections to the title, not including any objection on the ground of sale having been made during the life of the widow, were delivered on the 22nd of March: and in answer to the observation referred to, the vendors' solicitors, on the 5th of April, wrote,—“A brief of the pleadings can at any time be seen at our office.” About the 21st of April, the purchaser's counsel gave this further opinion. “Upon procuring a brief of the pleadings, I do not find that any cause is shewn for decreeing a sale before the time fixed by the testator's will,—his widow's death. Probably it would appear by the decree, the Court having power to decree a sale for payment of all debts. It also appears that two of the trustees of the will have disclaimed, and that one of those two is dead, though the facts are not noticed in the abstract.” The purchaser ultimately insisting upon the “objection that the [*44]

1842.—*Blacklow v. Laws.*

decree for sale was premature, the question was submitted to the Court by motion, on behalf of the vendors, that the purchaser should pay his purchase-money into Court, and on behalf of the purchaser, that he might be discharged from his purchase.

Mr. *Sharpe*, for the vendors, argued first, that the purchaser was precluded by the 8th condition, when more than twenty-one days had elapsed after the delivery of the abstract, from taking the objection as to the time of sale. The abstract had contained all the facts upon which the state of the title might have been known. It appeared that the widow had proved the will; and no mention was made of her death. It was not the practice to state in the abstract that parties interested in the estate were still alive: their existence was assumed, unless the contrary was stated. Secondly, the decree for sale, was made in a suit in which the widow was a party, with her consent. The Court must be presumed to have been satisfied that it was for the benefit of the infants that the estate should be sold: the circumstance that there was no inquiry whether it was for their benefit, does not impair the presumption, for the Court may be satisfied of the fact without inquiry, which is only one mode of deriving information. The property consisted of houses, and may be deteriorated, but is not likely to be improved. An erroneous conclusion in fact, if it were so, may be occasion for appeal but is not error in the decree.

Mr. *Dunn*, for the purchaser.—The 8th condition did not apply, for the abstract was not complete even at the time when the objection was taken, which was discovered not from the abstract,
 [*45] but from a different *document—the brief in the cause.
Tanner v. Smith (a); *Hodson v. Bell (b)* *Dalby v. Pullen (c)*. Any infant, interested in the estate, might, on attaining twenty-one, procure the cause to be reheard, and displace the decree.

(a) 10 Sim 410.

(b) 2 Beav. 17.

(c) 1 R. & Myl. 296.

1842.—*Blacklow v. Lawes.*

VICE-CHANCELLOR :—

The vendors in this case contend, first, that the objection taken by the purchaser to the title is not tenable, for they say the Court may anticipate the time of sale directed by a will, where it is for the benefit of the parties interested (although they may be infants), that an earlier sale should take place than the testator has prescribed; and therefore, that a sale in the lifetime of the widow is not error in the decree. Secondly, that the facts upon which the present objection is founded appear sufficiently upon the abstract, and that the purchaser is now precluded by the 8th condition of sale from taking the objection.

The purchaser, on the other hand, alleges—First, that the objection is fatal to the title, or at all events, that the title is one which a Court of Equity will not compel a purchaser to take; secondly, that the facts raising the objection were not sufficiently disclosed upon the abstract; and, thirdly, that the twenty-one days mentioned in the 8th condition are to be computed from the day when a perfect abstract was delivered: *Hodson v. Bell*; and he insists that the abstract first delivered was imperfect; that his objection was taken within the twenty-one days; and, that the abstract is not yet perfect.

Upon the principal question, I am of opinion, that the *sale in the lifetime of the widow creates such a defect [*46] in the title, that a Court of Equity ought not to compel a purchaser to accept it. In order to justify that opinion, I need not deny the power of the Court in any possible case to anticipate the time prescribed in a will for selling an infant's estate. All that I need say is, that a decree anticipating the sale of the estate is a departure from the trusts of the will; and that a case should be made for the exercise of such an extraordinary power. That case must be made either upon the pleadings, or upon a reference to the Master, or some other proceedings informing the Court of the case, which is relied upon as calling for so unusual an act. It has not been suggested at the bar that the decree can be supported upon the ground that the debts of the testator require the sale. The trustees therefore could not have made a good title to the estate; and in the absence of special circumstances, the Court, as a general

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proposition, does nothing more than the trustees might have done in the due execution of the express trust of the will. This bill asks the execution of the trusts of the will as they are set out in the pleadings; no case for departure from those trusts is made; and it is impossible to read the decree without seeing that the Court intended to do nothing more than execute the trusts of the will. It directs the trusts of the will to be performed, and the Master to sell such, if any, of the testator's estate as then remained unsold. If any of the infant Defendants were now to rehear the cause, I cannot doubt but that the Court would alter the decree, unless a case were made as the result of future inquiry or evidence to justify the Court in renewing the existing decree for sale.

Then has the purchaser accepted this defective title according to the construction of the 8th condition, so as to preclude
 [*47] himself from taking the objection to it *by the expiration of the twenty-one days there mentioned?

Now the first observation is:—The abstract does not contain the pleadings in the cause: the pleadings were called for by the purchaser's counsel on the 12th of March, before the expiration of the twenty-one days; and on the 5th of April, after the expiration of that time, the vendors' solicitors tender the brief for inspection at their office. If it has in truth been out of the inspection of these pleadings that the objection has arisen, it would be impossible for the vendors successfully to contend that it was not competent to the purchaser, after the twenty-one days, to insist upon an objection to the title arising out of a document which had been called for within that time. But this is the state of the case between the parties, unless the contents of the abstract are such as to deprive the purchaser of any argument founded upon the difference of the information disclosed by the pleadings and that disclosed by the abstract. In considering this, I must have regard to the principles of the Court as explained by the Master of the Rolls in *Burroughs v. Oakley* (a). The Court must anxiously protect the purchaser. The question must be whether as a conclusion of fact the Court is satisfied the

(a) 3 Swans. 159.

1842.—*Blackloy v. Laws*.

purchaser intended to waive, and has waived his right to object to this defect in the title. And in a question between the purchaser and vendors only, I cannot hold that he has done so unless the contents of the abstract are such as clearly to raise the present objection. If the purchase had been completed, it would undoubtedly have been difficult for the purchaser in a contest with a stranger, to have contended with effect, that the statement in the abstract, of the will having been proved by *Alice Christie* and **Laws*, did not affect him with notice that *Alice* the [*48] tenant for life survived the testator, and with all the consequences resulting from such notice. But the statement is not inconsistent with the supposition, that a good title might be made notwithstanding the widow was living. The suggestion on the remarks upon the abstract, and the argument of the vendors at the bar shew this (a). If the fact that the widow survived the testator and is still living, was absolutely inconsistent with the decree being right, the argument in favour of a waiver would be far stronger than it is. It was by the pleadings, and only by the pleadings, that the defect in the title really appeared. But in truth the abstract does not state that the widow survived the testator, except incidentally in stating another fact,—the probate of the will; and the decree as abstracted purports duly to carry into effect, not to vary, the trusts of the will as expressed therein. In these circumstances, and looking at the evidence before me, I think myself bound to hold, in a question between the vendors and purchaser before conveyance, that the abstract does not so point to the facts out of which the present objection arises, that I can consider the purchaser as having waived it. The abstract itself did not raise the objection, and if it did, the objection is established by the evidence which the purchaser called for before the twenty-one days expired.

The cause came on for further directions. The only material

(a) *Supra*, pp. 43, 44.

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question was, whether the gift of the annuity to the testator's daughter *Anne* (a), created a trust for her separate use.

[*49] Mr. *Sharpe* and Mr. *Rolt*, for the Plaintiffs, relied on **Tyler v. Lake* (b), as an authority that the annuity did not vest in the daughter to her separate use.

Mr. *Simpkinson*, for *Anne*, the daughter, contended that a series of decisions, anterior to *Tyler v. Lake*, had established that words of equivalent import to the words of this bequest were sufficient to create a separate use; and that *Tyler v. Lake* was distinguishable, because the use of similar words of gift to a son (c) shewed that the testatrix had not any special intention to exclude the husband of the daughter.

VICE-CHANCELLOR :—

The case of *Tyler v. Lake* (d) was an appeal from the *Vice-Chancellor*, who held that words very nearly similar to the words of this gift had not the effect of creating a separate interest in the wife. Lord *Brougham* said that, "If a sufficient strength of negative words is not to be found in the *gift or limitation*, you are not allowed to fish about for indications of intention from other parts of the instrument,"—and his Lordship refers to a case of *Stanton v. Hall* (e), where he says the same principle was acted upon. And Lord *Cottenham*, in the subsequent case of *Massey v. Parker* (f), which, though afterwards reversed by himself on one point, remains untouched on this, says:—"The cases require very distinct and unequivocal expressions to create a separate interest in the wife. In *Tyler v. Lake*, the *Lord Chancellor* says, that the husband is not to be excluded except by words which leave no doubt of the intention, and of the principle the case of *Tyler v. Lake*, which is

(a) *Supra*, p. 41.

(d) *Id.* 183.

(b) 2 R. & Myl. 183

(e) *Id.* 175.

(c) *Id.* 184.

(f) 2 Myl. & K. 174.

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also reported before the *Vice-Chancellor* (a), and the [*50] case of *Stanton v. Hall*, afford strong illustration. In neither of these cases did the claim of the wife prevail; although in *Stanton v. Hall*, the whole machinery of the instrument proved that such must have been the intention, but the required words of exclusion were wanting; and in *Tyler v. Lake*, the trustees were directed to pay the shares of the trust fund, into the proper hands of the married women, to and for their own use and benefit, and if they should be dead to pay the same to their husbands." Now, without presuming to question these dicta, I confess I do not understand how far either Lord *Brougham* or Lord *Cottenham* meant to say the rule in these cases goes. I take the rule to be universal, that nobody can entitle himself to an interest under a written instrument, unless he can make out that he is entitled to the interest he claims by the words of that instrument; and where the Court, by what is called implication, as distinguished from express gift, gives property to a claimant, it does not by so doing contravene the rule that an unequivocal intention to give must be found in the instrument itself (b). Now if the cases of *Tyler v. Lake*, *Stanton v. Hall*, and *Massey v. Parker*, are to be understood as laying down the rule, that in these particular cases of the marital right there must be negative words in the words of limitation,—certainly the marital right is protected by stricter rules than are applicable, at the present day, to any other right of property; for, with the exception of a few technical words, (the word "heir" or "exchange," for example, in a deed), courts of justice invariably affirm the proposition, that an intended gift shall take effect, provided the Court can find in the instrument a declared intention to give, although the simple words of limitation, unaided by implication arising out of other parts of the [*51] instrument might leave the intention uncertain. I do not know whether the learned Judges meant to go the length of saying, that the words of limitation themselves must, in this particular case, be absolutely unequivocal; but the authorities referred to place me in this situation,—that I must construe the will in this case with the

(a) 4 Sim. 144.

(b) See *Ancestor v. Mayer*, 1 Bro. C. C. 460—462.

 1842.—*Blacklow v. Laws*.

utmost strictness. If strictness of construction is to be relaxed, in a case of this class, it must be by a higher authority than mine.

With regard to the case of *Tyler v. Lake*, I presume to say it might well be supported without furnishing a necessary rule for the present case. The trust was to pay the proceeds of real estate into the proper hands of a married woman for her own use and benefit. And in certain events similar expressions were used, declaring trusts in favour of male persons. The direction to pay into the proper hands of the lady left untouched the marital right to the money when in her hands, and it was previously settled that the word "own" will not create separate interest in the wife: coupling this with the gift in the very same words to a male, the *Vice-Chancellor* held that a separate use was not created. Lord *Brougham*, however, did not form his judgment upon the same reasoning. He took a broader ground—after enforcing the necessity of finding direct words of exclusion, he said, that the word "proper" is the Latin form of the word "own" and therefore payment into her proper hands signifies the same thing, as into her "own" hands, and her "own" has no exclusive meaning, and upon that ground alone he determined that the gift in that case was not a gift for the wife's separate use. Now the present case is, in one respect, distinguishable from *Tyler v. Lake*, for the word "proper" is repeated in describing in what manner the wife is to hold and enjoy the property; and reported

[*52] cases of great authority certainly take a distinction, where there is a simple direction that a woman should receive, and where to that direction is superadded a direction, as to the manner in which she is to hold and enjoy the property. In *Tyrrell v. Hope* (a), there was an agreement that the wife should enjoy and receive the issues and profits: that is the mere legal consequence of the receipt of the money by her; yet in that case the direction that she should enjoy was held to create a separate use. In *Prichard v. Ames* (b), a like decree was made upon a similar ground; and in *Atcherley v. Vernon* (c), to the words "to be by her laid out in what she shall think fit," the same construction was

(a) 2 Atk. 561.

(b) 1 T. R. 222.

(c) 10 Mod. 518.

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applied. The gift in *Margetts v. Barringer* (a) was "for her own use and benefit, *independently* of any other person," which was held to exclude the husband. *Wardle v. Claxton* (b) seems to be the case of a gift to the separate use of the wife within those cases; but the *Vice-Chancellor* said that the direction to apply the fund for the maintenance of her children as well as herself, prevented the case from being brought within the language of the authorities (c). It was these cases, and the very strong expressions in the case before me, shewing that this was meant to be a gift to the separate use of the females, that led me to look into the authorities.

Admitting, then, that a direction to pay into the proper hands of a woman would not be a gift to her separate use, and that I am only to try whether the superadded words have any effect; the first thing which, independently of authority, I should have to consider is, the meaning of the word "proper," according "to the ordinary use of the English language. Now the [*53] word "proper" is defined as meaning "peculiar,"—"not belonging to other persons,"—"not common to other persons." And the ordinary rule of construction is to give, where it is possible, some effect to all the words. Now, if, in *Margetts v. Barringer*, a declaration, that the property was to be held by the lady "*independently of any other person*," created a separate use, it is difficult to see why the same effect should not be given to a direction (superadded to the direction to pay into her hands) that she shall hold it,—for her "peculiar use,"—so as not to belong to any other,—or so as not to be enjoyed by others "in common" with her. If the words are to have any operation, they must make it a gift to her separate use, as in *Margetts v. Barringer*, and other cases. Lord *Brougham*, however, rejecting or not relying upon the *Vice-Chancellor's* reasoning, goes (I might almost say) out of his way to decide that the word "proper" is mere repetition or surplusage, and means nothing more than "own," overruling a decision in which Lord *Alvanley* (d) held, that the use of the word "proper" would create a separate use.

(a) 7 Sim. 482.

(b) 9 Sim. 524.

(c) See *Kirk v. Paulin*, 7 Vin. Abr. 96, pl. 43.(d) *Hartley v. Hurle*, 5 Ves. 545.

 1842.—*Warrington v. Warrington*.

And I cannot, in the face of a decision of Lord *Brougham*, so recently given, and the remarks of Lord *Cottenham* on the same point, act on any impression of my own as to the word "proper" when applied as in this case.

Some observations were made on the language in other parts of this will; and it is remarkable that, though the testator creates separate interest in several instances, he adopts, in almost every case, a different set of words for doing so. And it may also be observed, that, in giving legacies to persons who are widows, he gives them [*54] to the sole use of the widows. The *case is open to the observation which Lord *Brougham* makes in *Tyler v. Lake*, that one cannot help seeing that the testator did not know the meaning of the words he was using. Although with a strong opinion that I decide this case against the real intention of the testator, my decision must be governed by that in *Tyler v. Lake*.

WARRINGTON v. WARRINGTON.

1842: 11th and 14th July.

The testatrix gave the residue of her real and personal estate equally between her brother, her sister, and her "nephew W., and E. his wife," (E being the niece of the testatrix) *Held*, that the husband and wife took one share each, and not merely one share between them.

THE question was, whether, under the will of *Elizabeth Warrington*, made in 1840, the defendants, *William Henry*, and *Emma* his wife, the nephew and niece of the testatrix, took one share, or two shares, of the residuary estate. The only material passage in the will was as follows:—

"My share of the estate called *Cynon*, in the county of *Montgomery*, and all other my real and personal estate, with the exception of *Carlton Lodge*, and that I leave to my dear niece and nephew, *Emma*, and *William Henry Warrington*, having but one half of that house, and garden; and all other my real and personal estate and property

 1842.—Warrington v. Warrington.

in the joint-stock bank called *Gloucestershire and Cheltenham Bank*, with all the rest, residue, and remainder of my trust estate and property whatever and wherever not herein disposed of, I leave equally between my brother *Thornhill Warrington*, my sister *Anne Van Corlandt*, widow, my nephew, *William Henry Warrington*, and *Emma* his wife, their heirs and assigns, nevertheless subject to any bequest and legacy herein mentioned."

*Mr. *Sharpe*, and Mr. *Berry*, for the Plaintiff. [*55]

The rule in joint-tenancy is thus stated by *Littleton* :—

"If a joint-estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law, in their right, but the moiety. And the cause is, for that the husband and wife are but one person in law; and are in like case as if an estate be made to two joint tenants, where the one hath, by force of the jointure, the one moiety, and the other, the other moiety. In the same manner it is, where an estate is made to the husband and wife and to two other men; in this case the husband and wife have but the third part, and the other two men, the other two parts" (a). *Bricker v. Whalley* (b); *Anon., Skin.* (c); *Green d. Crew v. King* (d); *Back v. Andrews* (e); *Doe d. Freestone v. Parratt* (f); *Roper, Tr. Husband and Wife* (g). There is no reason in the nature of a tenancy in common, for applying a different rule in this respect from that which is applied in joint-tenancy.

Mr. *Lewin*, for the defendant *Anne Van Corlandt*.

Mr. *Purvis* and Mr. *Toller*, for the defendants *William Henry Warrington*, and *Emma* his wife.

The case of *Bricker v. Whalley* turned on the peculiarity of expression by which the husband and wife were separated in the gift

(a) Sect. 291.

(b) 1 Vern. 233; S. C. 4 Vin. Ab. p. 154, tit. Baron and Feme, (M. a.) pl. 9.

(c) Skin. 182; S. C. 4 Vin. Ab. p. 154, pl. 10. (d) 2 W. Bl. 211.

(e) 2 Vern. 120; S. C. Prec. Cha. 1.

(f) 8 T. R. 652.

(g) Vol. 1, ch. 2, p. 51.

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by the conjunction "and" from the other persons—"to
 [*56] B., C., and D., and the "wife of D." In the simple case of a devise to a husband and wife, and a third person equally, *Popham*, C. J., is reported to have laid it down that they were tenants in common, inasmuch (quia) as they took every one of them a third part: *Lewin v. Cox* (a). In the *Attorney-General v. Bacchus* (b), a residuary bequest to a husband and wife was treated as a gift to two persons, and the legacy duty distinguished accordingly. *Watkins on Conveyancing* (c).

 VICE-CHANCELLOR:—

I cannot concur in the argument that the quantity of the interest to be taken by the husband and wife in this residuary gift depends upon the question whether the gift creates a joint-tenancy or a tenancy in common. The quantity of land which the husband and wife take, under devise like that before me, is a different question from that of the manner in which they take it. They may take their shares by entireties, and not by moieties as between themselves; but this legal result, as between the husband and wife, cannot affect the amount of the gift, as between them and third persons. The number of shares into which the residue is divided must be determined by counting the legatees, among whom it is *equally* given. It may be observed, that *Littleton*, in stating the rule which has been referred to, always illustrates it by placing the husband and wife as the first parties to whom the estate is made; and in *Bricker v. Whalley*, the occurrence of the word "and" before the names of the husband and wife is adverted to by the *Lord Keeper*. The circumstances relied on in that case exist here: the husband and wife are equally of kin to the
 [*57] testatrix: and there "is nothing in the disposition of the names which can import any intention to treat either of them differently from the other legatees. I cannot do otherwise than

(a) *Serjt. Moore*, 558, pl. 759.

(b) 9 Pri. 30; S. C. 11 Pri. 547.

(c) P. 156, ed. by Morley and Coote.

 1842.—King v. Leach.

hold the gift to be a gift in severalty to several persons; and the residue must therefore be divided into four shares, and the husband and wife declared to be entitled each to one of such shares.[1]

 KING v. LEACH.

1842: 30th July.

In a suit by an equitable mortgagee of leaseholds to enforce his security, a decree was made for sale in default of payment, and the premises were sold under the decree: the mortgagor, then out of the jurisdiction, was held not to be a trustee within the act 1 will 4, c. 60, for the purchaser, but to be a trustee within that act, for the plaintiff in the cause; and a person was appointed to execute the assignment in the place of such trustee.

J. LEACH deposited the lease of a dwelling-house, to which he was entitled for the residue of the term, with *J. Reid*, as a security, by way of equitable mortgage, for 500*l.* and interest. *Reid* died, and the Plaintiffs, his executors, filed their bill against *Leach* for payment of the debt; or, in default, that the premises might be sold. The answer admitted the debt and the mortgage. The decree, in May, 1839, directed an account of what was due for principal, interest, and costs, and payment by *Leach* within six months after the report; and in default that the premises should be sold, and the purchase-money paid into the Bank to the credit of the cause; that all proper parties should join in the assignment to the purchaser; and out of the proceeds of the sale the Plaintiffs be paid their debt and costs. The Master reported 581*l.* 17*s.* 8*d.* to be due for principal, interest, and costs, and appointed the 4th of February, 1840, for payment. Default was made, and the premises were sold to *T. Higham*, for 486*l.* The solicitor of *Leach* was attended with the draft assign-

[1] The rule of construction cited from Littleton, on the argument of this cause, is not inflexible, where a manifest intention to the contrary is to be discovered in the will; as where in a bequest to husband and wife, and a stranger, the words "share and share alike," or "equally," are annexed to the gift. *Paine v. Wagner*, 12 Sim. 184.

1842.—*King v. Leach.*

ment, but he declined to act further on behalf of *Leach*, and was ignorant of his residence, but said it was stated that *Leach* had gone to settle in America.

[*58] "The Plaintiffs by their petition prayed, that the Master or some other proper person might be directed to join with them in executing the assignment to the purchaser, and that he might pay the purchase-money to the petitioners.

Mr. *Temple*, for the petition, submitted that, inasmuch as the equitable interest was by virtue of the contract for sale transferred to the purchaser, a constructive trust was created, whereby *Leach* had become a trustee for the purchaser within the act, 1 Will. 4, c. 60: *Fellowes v. Till* (a).

Mr. *Rogers*, for the purchaser.

The case is not within any of the provisions of the statutes. They provide for a conveyance in substitution of that of the heir of the mortgagee, or of a mortgagee who is lunatic, or by an infant; but there is no power to direct a conveyance to be made in the place of a mortgagor merely out of the jurisdiction.

VICE-CHANCELLOR:—

It is impossible that *Leach* can be treated as a trustee for the purchaser in this case within the act. The act provides that it shall not extend to the case of a vendor, except in the particular circumstances provided for by the act (b), and those circumstances do not occur here. The decree, however, has declared the Plaintiffs entitled to have the premises sold, and assigned to the purchaser, and I think the effect of the decree was, to make *Leach* a trustee, not for the purchaser, but for the Plaintiffs in the cause; and *Leach*

[*59] being out of the jurisdiction, the Plaintiffs are entitled, under the act, to the order for the appointment of a person in the place of their trustee to assign the premises to the purchaser.

(a) 5 Sim. 319.

(b) 1 Will. 4, c. 60, s. 18.

1842.—*Edwards v. Meyrick.*

This Court doth order that *R. Richards, Esq.*, the Master, &c., be at liberty in the place and stead of the Defendant, *J. Leach*, to join the petitioners, the Plaintiffs, in making and executing the assignment of the leasehold premises in &c., to *T. Higham*, the purchaser thereof, under the said decree of the 30th of May, 1839; and it appearing that the purchase-money is not sufficient to pay the Plaintiffs the mortgage-debt due to them, and the costs of the suit, it is ordered that the said *T. Higham* do pay the said purchase-money and all interest due to them, up to and upon the completion of his said purchase, to the petitioners the plaintiffs, instead of paying the same into Court as directed, &c. Costs of the purchaser to be taxed and paid by the petitioners.

*EDWARDS v. MEYRICK.

[*60]

1842: 18th, 21st, 22nd, and 29th, July.

On a question of the propriety of a purchase by a solicitor from his client, the solicitor, in order to sustain the transaction, must, if he was solicitor *in hac re*, shew that he gave his client all that reasonable advice against himself, which his office of solicitor would have made it his duty to have given him against a third person; but the nature of the proof varies according to the subject of the purchase, the relative situation of the parties, and the equality of the footing upon which they stand, in reference to the subject of the contract; and, although the relationship of attorney and client may exist, yet if it has no existence *in hac re*, the rule with regard to the onus of proof may no longer be applicable.

It appeared by the evidence, although it was not stated on the pleadings, that the value of the minerals in an estate purchased by the solicitor from his client was considerably increased after the purchase, owing to a railroad then contemplated having been afterwards formed through the immediate neighbourhood; *Semble*, this was a merely speculative advantage, the communication of which his client, the solicitor would not be bound to prove, the parties being in the same situation with reference to the means of forming an opinion upon it.

Purchase by a solicitor from his client sustained under the circumstances, though part of the consideration was made up of costs.

On proof of some specific errors and overcharges in an account and bill of costs, inquiries were directed with respect to an account made up—and the balance of which was secured by a mortgage made thirteen years before the bill was filed.

IN the year 1815, the Defendant *W. Meyrick*, a solicitor at *Merthyr Tgdvil*, became acquainted with the fact of the existence of a settlement under which the Plaintiff, *Lewis Edwards*, a farmer in that neighbourhood, was entitled to property of considerable value.

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The Defendant having informed the Plaintiff of that fact, the latter, in 1817, instructed him to proceedings for the recovery of the settled property, and a bill was accordingly filed in the Court of Great Session in Wales. In this suit various proceedings were had,—an issue was directed,—a suit to impeach the settlement was commenced in this Court, and several ejectments were brought. In 1827 terms of compromise were adopted, and the same were finally carried into effect in 1829.

The Plaintiff was also the owner of two farms known as *Tyr Twppa* and *Yscwddgwyn*, which were not connected with the property in dispute; these farms were subject to a mortgage for 600*l.* Being indebted to the Defendant for money advanced and costs incurred in the proceedings adverted to, the Plaintiff executed indentures dated the 1st and 2nd of January, 1823, whereby he conveyed the [*61] farms *Tyr Twppa* and *Yscwddgwyn* to the Defendant in fee, by way of mortgage, to secure the sum of 1109*l.* 1*s.* 3*d.*, the alleged amount due to him at that time, of which the charge in respect of costs appeared to be about 816*l.* In 1825 the Plaintiff offered the two farms for sale to different persons, and the Defendant ultimately proposed to become himself the purchaser, at the price of 2,100*l.* The Plaintiff accepted the offer, and by indentures of the 1st and 2nd of February, 1825, which were prepared by the Defendant, and the execution of which by the Plaintiff was attested by another solicitor, the farms *Tyr Twppa* and *Yscwddgwyn* were conveyed to the Defendant absolutely, in consideration of 697*l.*, due for principal and interest to the prior mortgagee, 122*l.* 10*s.* 11*d.* stated to be due to the Defendant on his mortgage, and a sum of 178*l.* 9*s.* 1*d.* in cash, making up the 2100*l.* It was alleged that 100*l.* only was paid to the Plaintiff, and the remaining 78*l.* 9*s.* 1*d.* retained by the Defendant on account of his then current bill of costs against the Plaintiff. The Defendant, it was admitted, did not act as the solicitor of the Plaintiff after the year 1832, and according to the statement of the Defendant their relation of solicitor and client ceased in 1829.

In October, 1835, the Plaintiff applied to redeem the two farms, upon payment to the Defendant of what should be due to him,—

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treating the property as a security for that sum. In June, 1836, the Plaintiff filed his bill, charging that the mortgage in 1828 was obtained from him without any settlement of accounts, the Plaintiff being involved in suits and actions in respect of the litigated property and the Defendant being his sole solicitor and attorney: that the Plaintiff reluctantly consented to the subsequent sale, upon being pressed thereto by the Defendant, who knew that the Plaintiff had no other means of discharging the heavy demands for costs; that no solicitor was employed on his behalf; and that he had "never received more than the 100*l.* of the purchase ['62] money. The bill charged that the farms were, at the time of sale, even for the surface rent, worth considerably more than the consideration expressed to be given, and that there were valuable beds of coal and other minerals underneath, making the whole value 5000*l.* at the least; that the bills of costs of the Defendant contained numerous errors and overcharges, many of which to the amount of upwards of 100*l.*, the bill specifically stated; and it also alleged that credit had not been given for several sums which the Defendant had received.

The bill alleged that the Plaintiff was a Welch yeoman of very little education, and incompetent to examine bills of costs, if any had been delivered by the Defendant; and it charged that the mortgage, sale, and conveyance of the said farms to the Defendant ought to be declared fraudulent, or to stand only as a security for what was, at the time of the execution thereof, justly due to the Defendant, and that, upon payment thereof, the said farms ought to be re-conveyed: that the pretended settlement of accounts, and alleged mortgage security on the foot thereof, were not, under the circumstances, valid or conclusive in equity, and that the Plaintiff was entitled to have the accounts unravelled.

The bill prayed that the mortgage, sale, and conveyance might be declared to be fraudulent, and be set aside; or if the Court should be of opinion that the Defendant was entitled to hold the same as a security for his costs, then that the same might be declared to stand only as a security for what was justly due to the Defendant at the time of the execution thereof; and that an account thereof might be taken, as also an account of the rents and profits of the

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said farms come to the hands of the Defendant, and of the incumbrances paid off by him ; and that the farms might be

[*63] re-conveyed to the *Plaintiff, on payment of what should be due from him. The bill also prayed, in the alternative, that if the Court should be of opinion that the purchase and conveyance ought to be established, then that an account might be taken of what was due to the Plaintiff in respect of the purchase-money, and that the alleged settled account and mortgage security might be opened, and the accounts taken without reference thereto ; or if the Court were of opinion that the Plaintiff was not entitled to have the mortgage set aside, and the bill of costs opened for general taxation, that the Plaintiff might be at liberty to surcharge and falsify the same, and question the propriety of the work, and the reasonableness of the charges.

The Defendant, by his answer, denied all pressure or improper influence, and insisted that the Plaintiff was perfectly competent to act for himself in the matters in which he had been engaged, and which were now the subject of enquiry. He said it was only upon the solicitation of the Plaintiff that he had consented to become the purchaser of the two farms ; that the consideration was adequate,—the amount retained for his advances and costs justly due,—and the Plaintiff, in fact, still indebted to him : that the taxation of costs in the Courts of Great Session in Wales was not governed by the same rules as the Courts of Westminster : that the errors of computation or casting which appeared in the accounts were, he believed, owing to omissions and clerical errors, but which, in consequence of the death of *Watkins*, one of his clerks, by whom the accounts had been kept and made was not fully able to explain.

The effect of the evidence on several of the material facts will sufficiently appear in the foregoing statement (a), and

[*64] in the judgment (b). The witnesses *produced on behalf of the Defendant stated that the value of the farms had greatly improved since the purchase, by the making of the Rhymney Railway, in 1826 and 1827, through the parish of *Gellygare*, in

(a) *Supra*, pp. 60, 61.(b) *Infra*, pp. 68, 71—73.

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which the farms were situated: they also proved that *Watkins*, the clerk of the Defendant, who had attended to the account and bills of costs in question, died in 1828, and that many documents and papers had been lost by accident from the office (a).

Mr. *Sharpe* and Mr. *W. M. James*, for the Plaintiff.

First, this was a conveyance obtained by a solicitor from his client; and, therefore, unless in peculiar circumstances, and with the clearest proof of fairness on his part, cannot be sustained. *Gibson v. Jeyes* (b); *Hutch v. Hatch* (c); *Wood v. Downes* (d); *Bellow v. Russell* (e); *Welles v. Middleton* (f); *Hunter v. Atkins* (g); *Jones v. Thomas* (h); *Story on Equity*, Vol. 1, p. 307. The instruments were prepared by the Defendant himself—no attorney was interposed on behalf of the Plaintiff. It cannot be supposed, that, as a local solicitor, the Defendant was ignorant of the projected railway. No proof was adduced that the Plaintiff was informed of that circumstance. Secondly, the security given for the costs did not amount to a settlement of the bill, so as to preclude taxation. *Plenderleath v. Frazer* (i); *Crossley v. Parker* (k). The same principle being affirmed in *Waters v. Taylor* (l), and [*65] *Horlock v. Smith* (m); although, in the two latter cases, there were circumstances which do not occur in this case, that induced the Court not to disturb the settled account. In this case there was proof of particular errors and overcharges that would have been sufficient to open the account in any of the cases in which the Court upheld it.

The *Solicitor-general*, Mr. *Girdlestone*, and Mr. *Romilly*, for the Defendant.

There is no rule which, as against a solicitor, invalidates a con-

(a) See *Scougall v. Campbell*, 3 Russ. 545. A Special order of taxation after lapse of time.

(b) 6 Ves. 266.

(d) 18 Ves. 120.

(f) 1 Cox, 112; S. C. cited 18 Ves. 127.

(g) 3 Myl. & K. 135, per Lord Brougham.

(i) 3 Ves. & B. 175; per Lord Eldon.

(l) 2 Myl. & Cr. 526.

(c) 9 Ves. 292.

(e) 1 Ba. & Be. 104.

(h) 2 Y. & Coll. 498.

(k) 1 J. & W. 460.

(m) 2 Myl. & Cr. 495.

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tract merely because it is made between him and his client; he must, it is true, shew that he acted as he would have done if he had been dealing for his client with a third person; that he had not abused the confidence reposed in him. The capacity to make a contract binding, as well on the client as on the solicitor, is not denied in any of the authorities cited, and it is very distinctly affirmed in the others. *Montesquieu v. Sandys* (b); *Champion v. Rigby* (c); *Kingsland v. Barnewell* (d); *Cane v. Lord Allen* (e); The relative situations of a solicitor and his client, are not the same as those of trustee and cestui que trust; and if the rules applicable to both situations are founded on the same principles of caution in guarding against the use of an advantage incidental to the position of the parties, yet the improper exercise of influence is one thing, and the abuse of a necessary confidence or trust is another. The former may in some measure enter into every transaction between man and man, in which superior knowledge or address acquires ascendancy, and there would be no bounds to a jurisdiction which should proceed to question every contract attributed to it. The latter can arise only in cases which are comparatively few, and well defined. In the present case, which is not one of the latter description, there is a total absence of fraud in any of its species—there is no proof of any peculiar influence, or misrepresentation or concealment. There was no unequal knowledge of the subject of the contract; or if there was any inequality, the Plaintiff had the best means of information. The consideration is shewn to have been adequate. The intended railway, if of any importance as a matter of consideration at the time of the sale, must be taken to be as well known to the owner of the property as to the solicitor. This proceeding is instituted thirteen years after the mortgage, eleven years after the purchase; and when any relation of solicitor and client between the parties had ceased to exist for seven years:—after that lapse of time the Court will not open these accounts. *Waters v. Taylor*; *Horlock v.*

(a) 18 Ves. 302.

(b) 1 R. & Myl. 539; affirmed on appeal, L. C. 18th March, 1840.

(c) 4 Bro. P. C. 154, Toml. ed.

(d) 2 Dowl. 294.

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Smith. The inaccuracies, if they are ultimately shewn to have existed, are but of small amount compared with the purchase-money; and are not of sufficient importance to affect the settled account, in the circumstances. *Cooke v. Setree*(a); *Horlock v. Smith*; *Prenderleath v. Frazer*. The death of the clerk of the Defendant, who was the only person having a knowledge of many of the matters in question, at a distance of time when vouchers could not be expected to have been generally preserved, was a circumstance which would entitle the Defendant to protection, even if the case had been one of inquiry. The costs which occurred in the Court of Great Session would be very inconveniently made, if they could be made the subject of inquiry in this Court. *Ex parte Partridge* (b)

*VICE-CHANCELLOR:—

[*67]

The Plaintiff in this case, who is described by one of the witnesses as a hill farmer, is the owner of some property in *Wales*; and, according to the evidence to which I shall refer, a person perfectly competent to understand his own interests. The Defendant is a solicitor practising in the same neighbourhood. It appears, that, in 1815, the Defendant discovered the title of the Plaintiff to some estates, of which he was not then in possession; and having communicated the fact to the Plaintiff, he was retained by him as his solicitor in the proceedings necessary to recover these estates. Those proceedings were commenced in the Court of Great Session, and were prosecuted there, and in other Courts, during several years. In the year 1823, before these proceedings were brought to a close, the Defendant claimed from the Plaintiff a sum of about 1100*l.*; which, to the extent, of 800*l.* or more, appears to have been made up of costs incurred, or said to have been incurred, in the conduct of the business I have adverted to. The Defendant appears to have asked either for payment or security; and the result was, that the Plaintiff gave him a mortgage for 1100*l.*, and upwards, on two farms belonging to him, of which he was then in possession, not being part of the estates which were the subject of

(a) 1 V. & B. 126.

(b) 2 Mer. 504.

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the then existing suits. In those suits, the Defendant still continued to act as the solicitor of the Plaintiff; and in the year 1825, having then a further claim on the Plaintiff, he became the purchaser of the two farms of which he was mortgagee. The purchase-money agreed to be paid for the two farms was 2100*l*. The Defendant was to pay off a prior mortgage, and after retaining the Defendant's mortgage-debt, and certain costs, in respect of which some other credit was to be taken, the balance of the account, [*68] amounting to 178*l*., was to be paid to the Plaintiff.

In point of fact, the sum of 100*l*. only was paid to the Plaintiff, and the remaining 78*l*. were retained on account. It is clear, that the whole of the purchase-money was not paid. The litigation which first brought the Plaintiff and Defendant into communication with each other, does not appear to have terminated until 1829; down to which time, the Defendant acted as solicitor for the Plaintiff. I am not satisfied that there is any evidence of his so acting later than 1829. The present bill was filed in June, 1836.

[His Honor stated the substance of the prayer.]

It was not insisted in argument that a solicitor is under an actual incapacity to purchase from his client. There is not, in that case, the positive incapacity which exists between a trustee and his cestui que trust; but the rule the Court imposes is,—that inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client,—the onus lies on the solicitor to prove that the transaction was fair. *Montesquieu v. Sandys*(a); *Cane v. Lord Allen* (b). [1] The rule is expressed by Lord *Eldon* (c) to

(a) 18 Ves. 302.

(b) 2 Dow, 289.

(c) 6 Ves. 278. See also Sugden, Vend. & Pur. Vol. 3, p. 238, ed. 10.

[1] In *Howell v. Ransom*, 11 Paige R. 538, Walworth, Chancellor, held that where an attorney at law obtained from his client the assignment of a judgment for a consideration so grossly inadequate that the client would not probably have made the assignment if he had been fully informed of the facts which his attorney ought to have ascertained and communicated, the assignment would be set aside as constructively fraudulent. That it was not necessary for the client in such cases to prove actual fraud on the part of the attorney. That the burden of establishing the fairness of the sale, and that it was made upon a full and adequate consideration, was cast upon the attorney.

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be, that if the attorney "will mix with the character of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given him against a third person." It was argued that the rule I have referred to has no application, unless the Defendant was the Plaintiff's solicitor in hac re, and this argument is no doubt well founded. *Jones v. Thomas (a)*; *Gibson v. Jeyes (b)*. It appears to me, however, that the question "whether *Meyrick* was the solicitor in [*69] hac re, is one rather of words than of substance. The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand. In some cases, as between trustee and cestui que trust, the rule goes to the extent of creating a positive incapacity; the duties of the office of trustee requiring on general principles, that that particular case should be so guarded. The case of solicitor and client is, however, different. In the case of *Gibson v. Jeyes*, there was evidence that the client was of advanced age, and of much infirmity, both in mind and body, that the consideration was inadequate,—and of various other circumstances. Lord *Eldon* there shews how each of those circumstances gave rise to its appropriate duty on the part of the attorney. In other cases, where an attorney has been employed to manage an estate, he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made for his own advantage. *Cane v. Lord Allen (c)*. But as the

(a) 2 Y. & Coll. 498.

(b) 6 Ves. 266, 277.

(c) 2 Dow, 294,

That the attorney could not sustain his purchase without showing that he communicated to his client every thing necessary to enable him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered. See 1 Story's Equity, §13, §310, §311.

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give rise cannot of course attach upon him, whatever may be the other duties which the mere office of attorney [70] may imposed. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his inter-communication of such knowledge by the attorney will place the parties upon an equality,—when it is proved that the communication was made, the difficulty of supporting the transaction is quoad hoc removed. If, on the the other hand, the attorney has not had any concern with the estate respecting which the question arises, the particular duties to which any given situation of confidence might ests are directly opposed to each other, and it would be difficult,—and without the clearest evidence that no advantage was taken by the attorney of his position, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible—to support the transaction. In other cases the relation between the parties may simply produce a degree of influence and ascendancy, placing the client in circumstances of disadvantage; as where he is indebted to the attorney, and is unable to discharge the debt. The relative position of the parties, in such a case, must at least impose upon the attorney the duty of giving the full value for the estate, and the onus of proving that he did so. If he proves the full value to have been given, the ground for any unfavourable inference is removed. The cases may be traced through every possible variation until we reach the simple case where, though the relation of solicitor and client exists in one transaction, and, therefore, personal influence or ascendancy may operate in another, yet the relation not existing *in hac re*, the rule of equity to which I am now adverting may no longer apply.

The nature of the proof, therefore, which the Court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendancy or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length from the cases. *Gibson v.*

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Jeyes; Hatch v. Hatch (a) **Welles v. Middleton* (b); [*71]
Wood v. Downes (c); *Bellew v. Russell* (d); *Montesquieu v. Sandys*; *Cane v. Lord Allen*; *Hunter v. Atkins* (e).

I have, therefore, to consider the position in which these parties actually stood to each other. And I certainly am not treating the case of the Plaintiff too strictly when I exclude all considerations which the bill does not state as having existed; and, according to the statements in the bill, it does not appear that the Defendant had any peculiar or exclusive knowledge of these particular farms or the value of them, or that he had undertaken any particular duties respecting them which were opposed to his becoming a purchaser. No equity appears to me to arise, except that which might arise from the mere possibility of the relation of attorney and client, giving the attorney some influence or ascendancy over the client, and the circumstance that the Plaintiff was pressed by him to pay his bill of costs. On the evidence in the cause I am satisfied that the only ground upon which I can proceed, is this bare relation between the parties. Taking the obligations of the Defendant to stand as high as the relative position of the parties enable me to place them,—admitting the Defendant to be the attorney in *hac re*,—I cannot consider that he is bound to do more than prove that he gave the full value for the estate.

On the question of whether the full value was given for the estate, it has been proved that this was property situated in a coal country, although coal had never been worked under it. It does not appear that any coal works had approached so near to property in this neighbourhood that the value of the coal had ever [*72] been taken into account in sales of such property. The evidence shews that coal was known to be under it; but it clearly proves that in sales before this transaction the price was determined or the property valued with a view to alienation, according to the surface value founded upon the rental, at a certain number of years' purchase. In considering the evidence as to value I shall, therefore, confine myself to the surface value of the estate.

(a) 9 Ves. 292.

(b) 1 Cox, 112; *S. C.* cited 18 Ves. 127.

(c) 18 Ves. 120.

(d) 1 Ba. & Ba. 96.

(e) 3 Myl. & K. 112.

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[His Honor examined the evidence with regard to value, adduced by both parties, and which varied from 70*l.* to 85*l.* a year net, and from twenty to thirty years' purchase. It appeared that the Plaintiff had let the property at a rent of 70*l.* for the year preceding the sale, and it did not appear that he had at any time received a higher rent for the property. After the purchase by the Defendant it was let at 90*l.* per annum, with an allowance of 10*l.* for repairs. It was stated by the steward of Lord *Bute* that he (the steward) felt himself justified in offering 2100*l.* for the estate, Lord *Bute* having particular reasons for possessing the property.]

In *Montesquieu v. Sandys*, Lord *Eldon* by no means intimates that, where the transaction is fair in every other respect, no advantage having been taken of the relation of attorney and client, the fact that the amount given for the property, even if a third less than the value, would affect the transaction. He does not express any opinion upon that point. In this case, according to the highest estimate in the evidence referred to, so far as it is founded upon any calculation, (for I disregard general statements, the grounds of which are not given), the amount paid would be one-eighth less than the value. I do not think it too much to presume that [*73] the Plaintiff *himself knew the value of the estate: I do not find any evidence given by him to shew that he had let the estate at an under value, or to explain why it was so let. There is no evidence that the Defendant had any peculiar knowledge with respect to the estate: there is every possible reason to suppose that the Plaintiff knew the value of it better than the attorney, and it has not been thought by him to be worth more than 70*l.* a year. On that footing the purchase was made. If the case had stopped there, no question could have been made that the full and fair value of the estate had been given, even supposing *Meyrick* to be considered the purchaser as well as, *in hac re*, the attorney.

The material fact upon which any question of value is raised, is this,—that it is proved, and indeed, admitted, that the estate is worth more than 2100*l.* at the present time; and I think I may add, that it became worth much more very soon after the purchase was made. But to what do the parties attribute this? The whole

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of the evidence shews, that, up to the time of the purchase, the formation of a railroad had never been taken into account in the valuation of estates in that district; and that sales and purchases were made with reference only to the surface value. The purchase was made in February, 1825. In May, 1825, a bill for making a railroad through that part of the country received the royal assent; and in consequence of the railroad being made, there arose a probability of coal being worked at a period less remote than there was previously reason to anticipate; and, therefore, coal speculators would give a higher price for the property than they otherwise would have done.

The question then comes to this,—whether I could as against the Defendant, hold, that the relation in *which he [*74] stood as the Plaintiff's attorney, in the suits I have referred to, imposed on him the obligation to prove that he gave the Plaintiff notice that a railroad might be made, and that by possibility there might be an opportunity for working the coal under the land with advantage, and that, if it was worked, the land would be of greater value;—the whole of these considerations being purely of a speculative character? Now, certainly, looking at the relation in which these parties stood, I have no ground for supposing that this would be more likely to be present in the mind of *Meyrick*, than of any other person. He had nothing to do with these farms. The advantage to be derived from the proposed undertaking was a point as much open to one party as to the other, and was a merely speculative result, the communication of which I think I ought not now to require the Defendant to prove, unless, in fact, the land had at that time become of an improved value, owing to that circumstance. This, however, would be in the knowledge of the Plaintiff; and he has not suggested any such case. The fact relating to the railroad is not to be found in the pleadings: it comes out casually in the evidence that a railroad bill was at that time in contemplation; and then an argument is raised upon the assumption that *Meyrick* knew it, and took advantage of that knowledge. It is true, that the onus lies on the Defendant to shew that the treaty was fairly conducted; but I do not think that in this case I can reasonably hold the possi-

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bility of a speculative and consequential advantage of this kind to fall within those communications which an attorney is bound to prove he disclosed to his client. I cannot, on this part of the case, from any thing which is before me, form any conclusion whether this possible improvement ought or not to have been in the mind of any person dealing with the property. Considering, as I do, that the

Court is bound to watch strictly transactions between at-
 [*75] torney and client, I do not think that the Court is bound to allow a contingent advantage, which may or may not have been in the contemplation of the parties at the time, to afford ground for imputing fraud or improper concealment to the attorney, because he does not prove that he communicated it to his client.

I think that I should be carrying the doctrine of the Court farther than it has ever yet been carried, if I were to hold that a vendor, who has obtained from his solicitor thirty years' purchase for the estate, at the highest rent ever given for it up to the time of sale, so far as the evidence goes,—the solicitor being in no way connected with that estate,—can rescind the transaction after a lapse of eleven years from the time of the sale; the only new circumstance occurring during that time being the formation of a railway which has added to the value of the property. The acquiescence for so many years, coupled with the fact, that the foundation of the argument on the effect of the railroad was not brought forward in the pleadings, satisfies me that the Plaintiff felt that his case could derive no strength on that ground, and that it is, in fact, an after-thought.

I must make the same order as Lord *Eldon* made in *Montesquieu v. Sandys*, and dismiss so much of this bill as seeks to rescind the contract, without costs.

It being determined that the contract is to stand, it follows that the Plaintiff is entitled to the purchase-money; and then the question is, whether 110*l.* is to be taken conclusively as the sum which was due at the date of the mortgage. Of the other part of the purchase-money there must be an account taken.

The first and most convenient way of looking at this
 [*76] part of the case would be, to suppose that I had before me the bill of costs actually made out by *Meyrick*, and

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which constituted the particulars of the charge of the 1109*l.* secured by the mortgage. The bill charges minute and specific errors in that bill of costs, an error in the casting up of upwards of 40*l.*, and improper professional charges; the result of which, if proved, would be, that something more than 100*l.* would be taken off the whole bill of costs. I do not mean that this is the result of the evidence; for if that were so, there would be no doubt of the right of the Plaintiff to have the bill taxed. If the transaction also were recent, the allowance of the amount in the mortgage would not preclude the taxation of the bill. But, with regard to the effect of the acquiescence, I do not understand that the answer sets up time as a bar to the taxation. Then the case stands thus,—specific errors are alleged to exist in a bill to an amount which it would be most improper to disregard in taking the account of what is due in respect of the purchase-money; and which the Plaintiff should have an opportunity of proving. In *Waters v. Taylor*, the *Vice-Chancellor of England* held, that more than twenty years was not a bar to the taxation of a bill, even without proving specific errors, where a mortgage had been given pending the relation of solicitor and client. Lord *Cottenham* did not confirm that judgment; but decided, that after a settlement of accounts, and long acquiescence, the transaction ought to stand, unless specific errors were proved. I did not understand that judgment as importing, that if the bill were proved to be erroneous, the Court would not open it so far as was necessary to do justice between the parties.

I have hitherto assumed that the bill itself has been produced. I think the Defendant has proved that the bill was made out by *Watkins*, and other clerks; that a *copy of that [*77] bill was given to the Plaintiff; and that the Plaintiff, on one occasion, called with the copy of the bill, and had it explained to him by *Watkins*; and it is plain that he was so far satisfied with it as to execute a mortgage for securing the payment of it. These circumstances would materially affect the extent to which the decree of the Court should go; especially adverting to the fact, that *Watkins*, the clerk to whom the business was entrusted, is dead.

The parties have placed the Court as well as themselves in considerable difficulty in dealing with the question as to the bill of costs.

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The Defendant sets out in his schedule what he describes as a copy of the bill made out by *Watkins* for the Plaintiff, which would make up the sum secured by the mortgage; and he gives explanations of several parts of the bill. The Plaintiff being unwilling to take his account of the bill from the answer, with the explanations which the answer gives, avoided reading that part of the answer which related to it. The question then arises whether there is evidence of any errors whatever in the identical bill, the amount of which was the consideration for the mortgage. The Plaintiff produces a bill of costs or supposed bill of costs, and has examined witnesses to prove particular errors in it, and he proves the existence of errors in a bill which, for anything that appears in evidence, might not be a bill in any way connected with these transactions. In strictness I have no evidence to connect them and I certainly cannot think the fact that the bill agrees in amount with that which I find in the answer would justify me in taking it to be identified by the Plaintiff's evidence; but the Defendant produces a bill, not proved to be the bill delivered by himself, and he gives general evidence of its fairness. Each party produces a paper containing a number of items, there [*78] is nothing to identify either of these papers with the bill, the propriety and correctness of which is impeached in this suit, but witnesses are examined on both sides to shew the fairness or unfairness of a bill about which I know nothing, and can assume nothing. The Plaintiff then goes one step further, he identifies two items contained in that suppositious bill which he has produced as charges which have been actually made. I am called upon to infer, that the bill of costs as to which the witnesses have been examined must be the bill delivered by the Defendant. I can have no doubt of the fact. In the answer I find a bill of costs on which both parties have examined witnesses, corresponding with the bill of costs which the Defendant says he has made out. It would be trifling with justice if I did not send it for inquiry,

Another point then arises. It was said by Lord *Eldon* that, where a bill has been acquiesced in and paid, or security has been given for it, if, after many years have elapsed, there appear to be errors in it so gross as to amount to fraud, the Court will open it altogether, but

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the Court will not open it after it has been paid merely because there are charges in it which would not be allowed on taxation. One important difficulty in the present case is that the bill relates to matters with regard to which we are very little conversant. It was for business done in the Court of Great Session in Wales, and we have very imperfect means of knowing whether the charges were or were not regularly made. If in taxing the bill, one sixth is taken off, will the Court hold that reduction to be so far evidence that the bill of costs was fraudulent in its character; or will the Court hold the fact of the abatement in amount to be such evidence of misconduct as to disallow the Defendant his costs of the taxation? At present there is no evidence of fraud; I cannot assume that the items in this bill, which was settled in 1823, to some extent confirmed by the sale in 1825, and so long afterwards acquiesced in, are fraudulent. [79]

THIS Court doth dismiss so much of the Plaintiff's bill as seeks to set aside the sale in the pleadings mentioned, but without costs; and it is ordered, that it be referred to the Master to whom, &c., to take an account of what (if anything) is due in respect of the purchase-money on such sale, and, in taking such account, the Master is to inquire and state what was the bill of costs and account which made up the sum of 1109*l.* 1*s.* 3*d.* for which the mortgage of the 2nd day of July, 1823, in the pleadings mentioned, was taken; and whether any and which of the items of such bill and account were improper, and ought not to be allowed on taxation; and it is ordered, that each of the parties be at liberty to shew that they have not had credit for sums or business done for which credit ought to have been given; and it is ordered, that the said Master do tax the subsequent bill of the Defendant as solicitor for the Plaintiff, and take an account of subsequent money transactions between the Plaintiff and the Defendant, and for the better taking, &c., the parties are to produce, &c., and are to be examined upon interrogatories as the said Master shall direct, who in taking the said accounts, is to make unto the parties all just allowances; and the Master is to be at liberty to state any circumstances especially as he shall think fit; and this Court doth reserve the consideration of all further directions and of the costs of this suit not hereinbefore disposed of, until after the said Master shall have made his report. Liberty to apply.

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['80]

**PIGGIN v. CHEETHAM.*

1842 : 7th, and 14th July.

On a motion by a defendant for an immediate decree in a foreclosure suit, under the stat. 7 Geo. 2, or under the jurisdiction of the Court, independent of the statute, the order may be made without answer; and if the bill suggests that the defendant has parted with the equity of redemption, he will be allowed to give the required discovery as to that fact upon affidavit.

BILL of foreclosure, containing an allegation that the mortgagor pretended that he had, subsequently to the date of the mortgage, created or made divers or some incumbrances on, or disposition of the equity of redemption, and that he ought to set forth the particulars of the same.

Mr. *Selwyn*, for the Defendant, moved for an immediate decree, under the stat. 7 Geo. 2, c. 20, s. 2.(a) No answer was put in.

Mr. *Craig* opposed the motion, on the ground that the Plaintiff was entitled to a discovery of whether there were any subsequent incumbrances; for if there were, he would not acquire a title by the foreclosure.

The VICE-CHANCELLOR gave the Defendant leave to produce an affidavit on the fact of whether the equity of redemption had been dealt with.

In subsequently appeared that the Defendant had sold the estate; and the order was made by consent, the purchaser appearing and submitting to be bound, and undertaking to pay the principal, interest, and costs.

(a) See *Huson v. Huson*, 4 Ves. 105; *Bastard v. Clark*, 7 Ves. 489; *Wakerell v. Delight*, 9 Ves. 36; *Præd v. Hull*, 1 Sim. & St. 331; *Garth v. Thomas*, 2 Sim. & St. 188; *Lushington v. Price*, 9 Sim. 651; *Grane v. Mitchell*, 10 Sim. 484.

1842.—Attorney-General v. Foster.

*ATTORNEY—GENERAL FOSTER.

[*81]

1842: 16th and 18th July—4th, 5th, 8th, and 12th Nov.

After the trustees of a charity had put in their answer in a suit, and before the hearing, one trustee died, and another resigned. New trustees were appointed in their stead, but were not made parties to the cause before the hearing. After the cause was heard and judgment pronounced, an information was filed against the new trustees, praying the benefit of the former proceedings against them, and that they might be removed, as persons not duly qualified. The new trustees by their answer made a case to shew that the decree, if enforced, would be prejudicial to the charity, and insisted that it ought not to be made against them;—*Held*, that the new trustees came in under the founder, and not under the trustees for whom they were substituted;—that the issue on the information was not merely whether the new trustees were bound or not by the decree;—that, having been trustees at the time of the decree, they ought to have been made parties; that not having been parties, they were not so bound by the former proceedings as to be precluded from making a case by way of defence to the suit; and that the statement in their answer of further facts for that purpose was therefore not impertinent.

IN Trinity Term, 1835, the Attorney-General, at the relation of certain inhabitants of *Manchester*, exhibited his original information in this Court, which, as amended, was against the master and the trustees of the Free Grammar School of *Manchester*; and among others, against the Earl of *Wilton*, the Rev. *Thomas Foxley*, and *John Ford*, praying that an account might be taken of the estates of the said charity, and of the rents and revenues thereof, and of the manner in which the same were applied; and that it might be referred to the Master to settle a scheme for the permanent administration of the charity estates; and for the conduct, discipline, and studies of the said school, having regard to the circumstances in the said information particularly mentioned, and more especially to the altered habits of the times, and to the greatly augmented value of the said estates, and to the exigencies of the inhabitants of the said town; and that it might be declared, that it was proper and for the benefit of the charity, that the trustees thereof should be persons who reside or occupy premises within the town or suburbs of *Manchester*, and that it might be referred to the Master to enquire and state whether it would be proper and for

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the benefit of the charity, that any of the present trustees should be removed or any new trustees appointed, and who [*82] would be proper to be appointed such *new trustees; and that, in the meantime, the Defendants might be severally enjoined from proceeding to take any measures, by entering into contracts, appointing masters, pulling down or erecting buildings, or otherwise howsoever, for carrying into execution such parts of the order of this Court, of the 6th August, 1833, in the said information mentioned, and of the scheme thereby confirmed, as were not already or totally executed or completed; and that, if necessary, a receiver of the revenues of the charity estate might be appointed; and the information prayed general relief. The Defendants appeared and answered: a replication was filed, and the cause stood for hearing. In Michaelmas Term, 1837, a supplemental information was exhibited against Lord *Francis Egerton*, a new trustee, and a new master and usher, praying that the Defendants might answer the original and supplemental information, and that Lord *Francis Egerton* might set forth, whether he was a person resident within the parish of *Manchester*, or where he usually resided, and that the Attorney-General might have the same relief against such new trustee, and such master and usher respectively, as by the original information was prayed, and he would have been entitled to against the original Defendants, in whose place or stead they had been substituted; and general relief. The new Defendants appeared and answered. After the answers were filed, and before the causes came on to be heard, but in what stage of the causes did not more particularly appear, the Earl of *Wilton* resigned his situation as trustee, and *T. Foxley* and *J. Ford* died. The surviving and continuing trustees of the charity appointed the Defendants, *J. F. Foster*, of *Ashton-upon-Mersey*, in the county of *Chester*, *J. W. Patten*, of *Warrington*, and *H. H. Birley*, of *Eccles*, in the county of *Lancaster*, to be three of the trustees, in the room of those who had so resigned and died. The new [*83] *trustees, *J. F. Foster*, *J. W. Patten*, and *H. H. Birley*, were not brought before the Court or make parties to the record.

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On the 30th of November, 1839, the said original and supplemental causes came on for hearing before the *Lord Chancellor*, and were argued on several days in November and December, 1839. In the interim, before any judgment was pronounced, a new master and usher were appointed, and also a new dean of the collegiate church, who was the warden of the school.

On the 10th of November, 1840, the *Lord Chancellor* delivered judgment in the original and supplemental causes. Disputes arose with respect to the minutes of the decree, and they were not settled until a considerable time after the present information was filed.

The present information was filed on the 26th March, 1841, against the Defendants, *J. F. Foster*, *J. W. Patten*, and *H. H. Birley*, and the new master, usher, and dean, stating the foregoing facts and stating that on the appointment of the Defendants, the new trustees, some conveyance was executed by the surviving and continuing trustees or otherwise, whereby the charity estates were conveyed to, and the same were alleged to be vested in, the present Defendants, jointly with such surviving and continuing trustees; and that the Defendants had already acted, or had undertaken and intended respectively to act, in the management and administration of the charity and school, and the affairs thereof; that the Defendants resided at a considerable distance from the town and parish of *Manchester*, and none of them had any place of residence within the parish, although the deed of endowment expressly ordained and required, (as in the said original information mentioned),

*that the trustees should be persons resident within the [*84] parish; and, therefore, it was submitted, that the Defendants were not proper persons to be appointed or continued as trustees. The information then stated, that, on the hearing of the cause, in November, 1839, it was stated to the Court, that the Defendants were not parties to the record, whereupon counsel, who was instructed to appear as well on behalf of the said Defendants as of the said surviving and continuing trustees, stated on the part of Defendants, that they were willing and undertook to the present bound by such decree as his Lordship might pronounce in the cause; and thereby waived any formal objections that might otherwise have

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been taken, by reason of their not having been brought before the Court, as parties to the record; and the causes were upon such consent and undertaking allowed to proceed, and were fully heard.

The information then stated, that several changes in the officers of the school took place after the hearing, and before judgment was pronounced; that, in particular, the new dean of the college, and master and usher of the school, were appointed in the interval; and that the judgment of the *Lord Chancellor* in the original and supplemental information was delivered on the 10th of November, 1840. The information then stated, that the *Lord Chancellor* directed and adjudged, that the decree to be drawn up in conformity with his said judgment of the 10th of November, 1840, should contain, among other things, certain declarations with respect to the future appointments of feoffees and trustees of the charity,—the age of the children who were entitled to be admitted to the school,—the appli-

cation of the funds in exhibitions,—and the taking of
[*85] boarders by the masters; and that a reference should be directed to approve of such alterations in the scheme of 1838, as might be necessary, having regard to the amount and particulars of the property of the charity, and the existing circumstances of the town and neighbourhood of *Manchester*. The information stated, that the terms of the decree were not drawn up and settled, but the same still remained in minutes, and that the informant had caused an application to be made to the solicitors of the several parties in the original and supplemental causes, and requested them to instruct counsel to appear before the *Lord Chancellor* upon the discussion of the minutes, in order that the terms of the decree might be settled; but the said solicitors objected to any further step being taken in the cause, unless the present Defendants as such new trustees, and the new master, usher, and warden were brought before the Court as parties thereto, and in consequence of such objection, no further proceeding had been taken to perfect the decree or prosecute the causes: that the present Defendants as such new trustees, and said new officers of the school and charity were, or claimed to be, entitled in the subject-matter of the original and

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supplemental informations, and were necessary parties to the prosecution of the decree therein.

The information then, in the common form of introducing interrogatories, proceeded :—"To the end, therefore, that the said Defendants may, upon their several and respective oaths, and according to the best of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all the matters aforesaid, as if the same were hereinafter repeated, and they distinctly interrogated thereto; and, more especially, that the said *J. F. Foster*, *J. W. Patten*, and *H. H. Birley* may respectively answer "and set forth whether they ['86] are persons who are resident within the said parish, and where they do usually reside, and at what distance or how many miles from the said parish or how otherwise." The information then prayed, that the Defendants might answer the premises, and that the Attorney-General might have the same relief against them as by the said original and supplemental informations was prayed, and as he would have been entitled to against the several Defendants thereto, in whose place they had been substituted; and, especially, that the present Defendants might be removed from being trustees, and other trustees appointed in their place.

The Defendants, *J. B. Foster*, *J. W. Patten*, and *H. H. Birley*, by their answer, denied that counsel had appeared for them, and given the undertaking suggested in the present information. They admitted that the minutes of the decree were afterwards settled and passed as of the 5th of December, 1839; however the Defendants submitted and insisted, that the said decree, even if it were right in merits and substance, was utterly valid and irregular as to them; that they were trustees of the charity before and on the 5th of December, 1839, and, nevertheless, they were not parties to the suits in which the said decree was made, nor are they named in the said decree. The Defendants denied that the Attorney-General was entitled to the benefit of the suit and proceedings as against them. They said that he was not entitled to any part of the relief which he prayed, either by the original or supplemental information; and in order to make out that he was not entitled to any part of such

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relief, more especially as against the Defendants, they insisted on the several matters by their answer appearing, and referred to the answers filed by the trustees, who were De-

[*87] Defendants to the said original and amended information.

The Defendants said that divers matters had occurred, and that divers other matters had been ascertained since the said answers were filed, material to the merits of the questions raised by the said information ; and the Defendants insisted upon the matters stated in the answers of the said trustees, which they did not repeat, as well as on the further matters in their answer stated, as a defence against the said information.

The defendants, by that part of their answer which was the subject of exception for impertinence, said, that shortly after Christmas, 1836, the enlarged scheme of instruction approved of by the said order of August, 1833, was carried into effect under the superintendence of the high master of the said school, and the warden of *Manchester* College, and the same was found to work satisfactorily, until the said judgment of the *Lord Chancellor*, of the 10th of November, 1840, was pronounced ; and more especially, it gave satisfaction to such persons in *Manchester* and the neighbourhood, as were desirous that boys and youths who were inclined to study the learned languages with a view to prepare them for the Universities, should have the means of proper instruction and education with that object. They stated the subsequent history of the charity, and the view entertained by the Defendants from the facts that had taken place, of the prospects of the school under the different regulations theretofore adopted, and those directed by the said decree. The Defendants also stated, as such further facts, the number and internal arrangements of the school since the scheme of 1833 had come into operation ; the proportions of boarders and day scholars ; the diminution of the boarders on the declaration of their ineligibility for exhibitions ; the present and prospective diminution of revenue, and the insufficiency of the existing income to

[*88] do more than continue the school on its present footing ; the comparatively small number of children of parents residing in *Manchester*, who were candidates for exhibitions or de-

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signed to go to the Universities; the absence of any difference in the treatment of the different classes of scholars; the conduct of the examinations, and the situation of the examiners as excluding all partiality; that the child of the poorest parent was advanced where the candidates were in other respects equal; that the effect of the decree would be to exclude boarders, and thereby to deprive the school of masters of superior talent, and destroy the charity as a grammar-school; the number of the different classes of scholars before and since the decree; and that the object of the relators was to put an end to the exhibitions, and apply the revenues to other educational purposes.

Five exceptions, for impertinence, were taken to that part of the answer, the substance of which is stated in the foregoing paragraph. The Master overruled the exceptions, and to his report exceptions were taken.

Mr. Anderdon, and *Mr. Mylne*, for the informant.

The pertinence of the statements depends upon their applicability to the issue raised by the information: the only questions raised by the information are,—whether the defendants are or are not bound by the decree which has been made, and if bound, whether their continuance as trustees is consistent with the decree: the statements in the answer as applicable to either of these questions are properly made, and are not excepted to; but statements put forward to shew that the decree was erroneous are wholly beside this cause. The form of the suit is that of an original bill in the nature of a bill of revivor. If the information were ['89] not properly framed to raise the simple question, whether the Defendants are bound by the decree, and no other question, the form of defence should have been by demurrer; *Nanney v. Totty* (a); *Wagstaff v. Bryan* (b); *Devaynes v. Morris* (c); Lord *Redesdale*, Tr. pp. 71, 97, ed. 4. The Defendants are in a situation analogous to that of purchasers *pendente lite*, and are, in fact,

(a) 11 Pri. 117.

(b) 1 R. & Myl. 28

(c) 1 Myl. & Cr. 212.

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bound by the proceedings in the cause, which they cannot disturb or set aside except by bill of review. *Bishop of Winchester v. Paine* (a) Or, their position may be compared with that of the assignees of a defendant who has become bankrupt, who are bound by the suit so far as it has proceeded against the bankrupt. If the course taken by the Defendants is regular, the final decree of the Court may be defeated or postponed indefinitely, by Defendants transferring their interests to new parties on the eve of the hearing: *Attorney-General v. Clack* (b); *Eades v. Harris* (c).

[VICE-CHANCELLOR :—The duty of the Master upon a reference for importance, is in the first place to inform himself of the scope of the bill, in order that he may see what decree, according to the scope of the bill, the Court may make at the hearing,—not what decree in his judgment the Court ought to make. If the matter be pertinent according to any decree that may be made within the scope of the bill, it cannot be held impertinent. If, according to the scope of the bill, the matter cannot be material or relevant, then it is impertinent. *Devaynes v. Morris* was a case of revivor [*90] only, and the only order that could be made *was, that the bill should be revived or dismissed; the merits were wholly immaterial, and any suggestion in the answer, going to the merits, was therefore impertinent. Such also were the cases of *Wagstaff v. Bryan* and *Nanney v. Totty*, but the form of this bill, taking it literally, is not of that kind. I do not concur in the argument, that if this case was at the hearing, and the Court could not declare that the Defendants were bound by the decree, the bill must be dismissed. If a defendant, instead of demurring where a bill is open to demurrer, thinks proper to answer the bill, it is a new proposition, to say that his answer is therefore impertinent.]

Sir Charles Wetherell, Mr. Russell, and Mr. Bagshawe, for the Defendants.

The decree, in the absence of some of the trustees of the charity,

(a) 11 Ves. 194.

(b) 1 Beav. 467.

(c) 1 Y. & Coll. C. C. 230.

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was inoperative. The information, which is filed to give effect to the decree, has no resemblance to a bill of revivor; it must, as against these Defendants, be wholly an original information. It may be *also*, as respects the former proceedings, in the nature of a supplemental information. The exceptions draw an arbitrary distinction between different parts of the answer, all of which, if the objection was well founded, would be equally liable to exception; and the effect is to retain so much of the answer as might be useful to bind the Defendants by the proceedings, and expunge so much as tends to shew why they ought not to be bound. The defendants do not derive their title from, nor claim under, the trustees for whom they are substituted: if the persons in whose place the Defendants nominally stand, had never been regularly appointed, and had never in fact been trustees, it would have been wholly immaterial to the title of these Defendants: they claim "only under [*91] the founder of the charity, and come within those cases where the benefit of the former proceedings can only be obtained by an original bill in the nature of a supplemental bill. Lord *Redesdale*, Tr. p. 98, ed. 4; *Lloyd v. Johnes* (a); *Langley v. Fisher* (b). It frequently occurs, that trustees find it necessary to sever in their defence; (although it is not suggested in this case) it may happen that one trustee neglects the protection of, or designedly prejudices, the trust-estate; it cannot be said that the misfeasance of one is to exclude the other from doing his duty. It might be that the material grounds of defence in a cause have been purposely kept out of view.

Mr. *Anderdon*, in reply.

In the case of *Lloyd v. Johnes*, the reasoning of Lord *Eldon* is to the effect that the first tenant in tail representing the inheritance, the proceedings against him are binding upon the second tenant in tail, although he claims *per formam doni*, and not under the last Defendant (c). The second tenant in tail may bring forward new equities, but they must be equities peculiar to himself, not affected by the same circumstances (d),—not common to both himself and

(a) 9 Ves. 37.

(b) 10 Sim. 345.

(c) 9 Ves. 56—59.

(d) *Id.* 60.

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the former Defendant; as is the case of the Defendants in these informations. The trustees who defended the suit represented the whole estate of the charity, at least up to the moment of the introduction of the present Defendants. According to the case of *Lloyd v. Johnes*, the present Defendants are bound by what had then been done in the cause.

[*92] *VICE-CHANCELLOR :—

The question raised upon these exceptions had been argued upon one broad principle : namely, that in the circumstances of this case the new trustees were completely bound by the answer of the trustees in whose places they were substituted ; and that it was not competent to them to set up, by their answer, a case for the purpose of shewing why, upon the merits, the decree of December, 1839, ought not to have been made, and ought not now to be made against them. No distinction was made of one part of the exceptions from another. It was not argued that the matter excepted to was impertinent, provided it were competent to the Defendants to make a case, by their answer, as a defence to the relief prayed by the original information. The relators contended that the new trustees were concluded by the answer of the former trustees, and the subsequent proceedings. I entirely accede to the principle established by the cases of *Devaynes v. Morris* (a), and *Wagstaff v. Bryan* (b). Nothing ought to be in the answer except that which is called for by the bill, or would be material to the defence with reference to the order or decree which may be made at the hearing of the cause. The question is upon the application of that principle to the present case.

I must lay out of consideration the alleged undertaking of counsel at the hearing of the original and supplemental information. The truth of that allegation is in dispute, and I must assume that the relators may not establish it in proof ; and the Defendants must therefore have a right to make such a defence to this information as they might have made if no such undertaking were given.

(a) 1 Myl. & Cr. 212.

(b) 1 R. & Myl. 28.

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"The argument in support of the exceptions was rested [*93] upon two distinct grounds :—First, it was said, that when the fact is once admitted, that the new trustees came into the places of those who had answered the original information, and to whom they succeeded, it follows, that they are as completely bound by the proceedings in the cause, including the decree, as if they had been originally parties. It was said, that this information, in fact, falls under that description of pleading which Lord *Redesdale* terms an original bill in the nature of a bill of revivor, and which he points out as the proper form of proceeding, where the death or other cessation of the interest of a party is attended with such a transmission of that interest, that the person entitled may be the subject of controversy, and the suit, therefore, is not permitted to be continued by a mere bill of revivor, but in which no other question can be litigated (a). Pursuing the expressions of Lord *Redesdale* on the same point, it is argued, that, as an original bill in the nature of a bill of revivor has so far the effect of a bill of revivor, that the new party, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit, and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him (b), as if the suit had been continued by bill of revivor,—so, in this case, the relators are entitled to the benefit of the former proceedings against these trustees, subject only to the question, whether they are or are not the substituted trustees. Secondly, it was said, that, if the relation of the parties were not such as to entitle the Attorney-General to the benefit which the former proposition assumes, the supplemental information was so framed as to tender one issue only ; namely, whether the Defendants are bound or not bound by the former proceedings ; and that [*94] if, at the hearing of the cause, the Court should be of opinion that the Defendants are not bound by the proceedings in the original cause, the present information must be dismissed, and the Court could make no decree against the new trustees, upon the merits of the case made by the original information. I have considered both these grounds, and excluding the second, I think the first cannot be

(a) Tr. Pleading, p. 71, ed. 4.

(b) Id. 97.

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supported. I think the practice of the Court required that the new trustees should have been brought before the court before the hearing of the original and supplemental information, in which the decree was ultimately drawn up. At that time, they were not less the representatives and protectors of the charity, than any other of the trustees; and the charity was not, in their absence, properly represented at the hearing of the cause.

The position of the new trustees was likened at the bar to that of a purchaser pendente lite; and I was referred to the case of *The Bishop of Winchester v. Paine* (a). I do not admit the analogy. I think the new trustees are not to be considered as purchasers, pendente lite, under the other trustees; but that they came in under the founder, and were necessary parties to the decree. The information itself so treats the case, and I think correctly.

If I am right in this view of the question, it will follow, that the new trustees must, at the time of answering this information, be in the same position as if the present information had been filed against them, and they had answered it before the original and [*95] first supplemental information were heard. In that case, it is clear, that they might have made any defence which the justice of the case required, subject to a question of costs if they had needlessly repeated that which was contained in the answers of the former trustees. My proposition is, not that the new trustees would necessarily be unaffected by the answers of the former trustees, or by the proceedings in this cause anterior to their appointment, but that they were not so bound as to be absolutely precluded from making a proper case against the decree prayed against them, and from being heard to argue against its correctness and propriety. The assignees of a defendant who becomes bankrupt after answer, may in some sense be affected by his answer; but they are not necessarily precluded, by their relation to the bankrupt, from stating their own case in their answer, against the relief prayed by the bill.

Extreme cases were put for the purpose of shewing the inconvenience which possibly might result from repeated changes of trust

(a) 11 Ves. 194.

 1842.—Radford v. Roberts.

ees. But those extreme cases (which, in fact, rarely if ever occur,) do not furnish the rule for cases like the present, which would have been subject to no difficulty whatever, if that which I consider the regular practice of the Court had been attended to.

Upon the second question, which is one of strict pleading, I have felt no difficulty. But adverting to what Lord *Redesdale* says, as to the frame of those original bills, which are filed for the purpose of having the benefit of proceedings in existing suits against persons not parties to those proceedings^(a), and to what Lord *Eldon* both said and determined in *Lloyd v. Johnes*^(b), respecting bills of that nature, "(notwithstanding the intimation of ['96] his opinion as to what the more convenient rule of pleading would be,) I think that the facts which constitute the case made by the original information are so far put in issue by the present information, that the Court might, at the hearing of this information, go into the case at large against the new trustees; and would not, at that hearing, be confined to the narrow issue which the argument for the Attorney-General assumes.

Report confirmed.

 RADFORD v. ROBERTS.

1842: 17 Nov.

The Court will not make the Order allowing the Plaintiff to enter an appearance for the Defendant, under the 8th Order of August, 1841, after several months have elapsed since the service of the subpoena, unexplained, except upon notice.

MR. CRAIG moved, *ex parte*, to enter an appearance for the Defendant, under the Order VIII. of August, 1841. The subpoena was served on the 18th of June.

THE VICE-CHANCELLOR said the object of the Order was to pre-

(a) Tr. Pleading, p. 98, ed. 4.

(b) 9 Ves. 37.

 1842.—Lane v. Oliver.

vent delay in the prosecution of the cause: but if the Plaintiff allows a long time to elapse between the service of the subpoena on the Defendant and his application under the Order, intermediate circumstances may have made the order improper, and he must give notice of the motion, or explain the delay,—that he found that practice had been adopted at the Rolls, and he should follow it^(a).

[*97]

*LANE v. OLIVER.

1842: 24th and 25th November.

A party in a cause who has obtained and served, according to the 12th amended Order of August, 1841, an order that his solicitor shall deliver his bill of costs within a month,—which is disobeyed,—is entitled under the 15th Order of August, 1841, to enforce obedience by the writ of attachment.

THE Plaintiffs obtained an order that their solicitor (not a party in the cause) should deliver his bill of costs within a month. The order was served on the solicitor, with the memorandum endorsed thereon, in the form prescribed by the Order XII. of August, 1841 (amended April, 1842) ^(b). The solicitor having failed to deliver his bill within the time specified, a writ of attachment was prepared and presented for sealing, under the Order XV. of August, 1841 ^(c), which provides that every person not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause. The clerk of records and writs considered, that the case was not one in which the Plaintiffs, within the orders, were entitled to the writ, and refused to seal the attachment until the opinion of the court was taken.

(a) In some cases where there had been delay, the order, at the request of the Plaintiff, was made in the form directed in *Husham v. Dixon*, 1 Y. & Coll. C. C. 208, instead of serving notice of the motion.

(b) See Beav. Ord. Can. pp. 167, 198.

(c) Order IV., 26th October, 1842, Beav. Ord. Can. p. 206.

 1842.—*Havard v. Price.*

THE VICE-CHANCELLOR directed the writ to be sealed,—saying, that the object proposed by the 15th Order was, that the process which was considered the most effectual, should be applicable to all cases, whether for or against parties, or persons not parties, and that the proceeding by attachment was adopted upon that principle as preferable to that of obtaining the four-day order.

Mr. *Lloyd* appeared for the Plaintiffs.

*HAVARD *v.* PRICE.

[*98]

1842: 4th and 17th November.

A gift by will of all the interest of the testatrix in certain stock, followed by a codicil directing that a debt owing to her should, at her death, be laid out in the same stock, will not pass the amount of the debt to the legatees of the stock.

THE testatrix by her will, made in 1826, gave “the interest of the Three per Cents. Consolidated Bank Annuities,” to her daughter for life, and she bequeathed successive life estates and interests in remainder in the same stock, after the death of her daughter, to parties who were Defendants.

Afterwards, the testatrix made a memorandum, in the shape of a letter to her executor, which was proved as a codicil to her will, in these words:—“Mr. *J. Price*. As I have appointed you my executor, it is requisite you should know that I hold a note of hand on Mr. *Samuel Havard* for 1500*l.*, it is my desire, at my demise, that should be placed in the Three per Cent. Consolidated Bank Annuities.” A question was made in the cause, whether the 1500*l.* due on the promissory note, and so directed to be invested in Consols, was included in the foregoing specific bequest of Consols; or, whether (there being no residuary gift) the money due on the note was undisposed of. There appeared to have been a sum of 100*l.* Three per Cent. Consols, belonging to the testatrix at her death.

Mr. *Sharpe*, and Mr. *Torriano*, for the Plaintiff, the husband of the daughter.

1842.—*Earl of Glengall v. Fraser.*

Mr. Koe, Mr. Spurrier, and Mr. Birkbeck, for the parties interested in the specific bequest.

VICE-CHANCELLOR :—

I cannot construe the gift of the Three per Cent. Consols [*99] to include not only stock of that description *which the testatrix had at the time of making her will, but also stock which she intended should be afterwards purchased: the sum due on the promissory note did not exist as stock, either at the date of the will or at the death of the testatrix. It was not invested at either of those periods. It must be declared, that the sum due from the Plaintiff on the promissory note, is not disposed of either by the will or codicil.

EARL OF GLENGALL *v.* FRAZER.

1842; 14th Dec.

Discovery :—Case in which a Defendant must seek for information, which he may not himself possess.

In answer to a bill seeking to impeach a security and requiring the Defendant to set forth what communications passed between his solicitor and agents in the transaction and the Plaintiff; and what letters were written and received, and entries made on the subject by such solicitors, it is not sufficient for the Defendant to say, that the solicitors had ceased for several years since the transaction to be his solicitors or agents, and that he does not know what communications or entries they had or made: the Defendant, if he has not personal knowledge of the facts, must at least shew that he has endeavoured to acquire the information from his agents in the transaction in question.

In the year 1825, the Plaintiff, in consideration of the loan of 2999*l.* by the Defendants, granted them an annuity of 298*l.* 11*s.* for the term of 100 years, if the Plaintiff should so long live; which annuity was charged on the estates of the Plaintiff, in Ireland. The sum so borrowed was also further secured by a bond for 6,000*l.*, and by warrant of attorney to confess judgment both in *England* and *Ireland*, for the same sum.

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In June, 1842, the bill was filed, alleging that the memorial of the annuity enrolled in pursuance of the statute, under the title "consideration and how paid," stated; "2999*l.* of lawful money of the United Kingdom of *Great Britain and Ireland*, of English value and currency paid to the said *Richard, Earl of Glengall*, at the time of the execution of the said indenture, in notes of the governor and company of the Bank of *England*, payable to bearer on demand;" whereas, the same was, in fact, paid partly in notes and partly in sovereigns. The bill charged that the securities were therefore void, and prayed that they might be set *["100"]* aside, and Defendants restrained from taking proceedings founded upon the judgments either at law or in equity, in *England or Ireland*. The bill contained charges, upon which interrogatories to the following effect were founded:—Whether the Plaintiff, about the time of granting the annuity, did not have some, and what, interviews with the Defendants, and with Messrs. *Dawson, Capron, Rowley, and Weld*; and whether the Plaintiff did not also write and send some and what letters to the Defendants, and to Messrs. *Dawson & Co.*, with reference to the money to be advanced by the Defendants to the Plaintiff, or to the annuity which he was in consideration thereof to grant them, or to the mode in which such annuity was to be secured, or for some other purpose; and whether Messrs. *Dawson & Co.*, at that or some time, were not or did not act, and whether they are not now, or do not act as the solicitors of the Defendants; or how long had they ceased to act as such solicitors; and whether the Defendants, and Messrs. *Dawson & Co.*, had not made some and what entries in books; and whether they had not respectively written, sent, or received, to or from each other, or to and from other and what persons, some and what letters or letter relating to or mentioning the consideration-money agreed to be paid to the Plaintiff for the said annuity; and whether thereby the truth of the matters alleged would not appear; and whether such books and letters were not in the possession or power of the Defendants, or Messrs. *Dawson & Co.*

The Defendants, in their answer, said they believed that the Plaintiff had some interviews with Messrs. *Dawson & Co.*, who acted as

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the Plaintiff's solicitors, with reference to the money to be advanced by the Defendants to the Plaintiff, and to the said annuity, and the mode in which such annuity was secured ; but save, as aforesaid, the Defendants severally said they did not know, and they could not answer, as to their information, belief, or otherwise, whether the Plaintiff, at such time, or at any time, did or not have any or what interview or interviews with Messrs. *Dawson & Co.*, or any of them, or whether the Plaintiff did or not also write and send letters to Messrs. *Dawson & Co.* with reference to the said matters (following the words in the bill). And the Defendants said that Messrs. *Dawson & Co.* had respectively ceased to act, and they had not, nor had any of them, acted as the solicitors &c. of the Defendants, or either of them, for the space of seven years and upwards. The Defendants said that one of the Defendants had occasionally had interviews with Messrs. *Dawson & Co.* to obtain information with respect to the payment of the annuity by the Plaintiff, but not as the attorneys or solicitors of the Defendants, or either of them ; and that the last of such interviews took place in August, 1842. The Defendants said they did not know, and could not answer, as to their information, belief, or otherwise, whether Messrs. *Dawson & Co.* had &c. [following the interrogatory as to entries, letters, &c.], or whether thereby the truth of the alleged matters would appear ; and save as aforesaid the Defendants denied that any such books or letters were then in the possession or power of the Defendants, or either of them ; and they did not know, and could not answer, as to their information, belief, or otherwise, whether such books or letters were then in the possession or power of Messrs. *Dawson & Co.*

Exceptions for insufficiency of the answer were taken, and allowed by the Master.

[*102] *Mr. *James Parker*, for the Defendants, in support of exceptions to the Master's report.

The Defendants have answered to the utmost of their knowledge ; and it will be new, in principle, and operate with great severity on Defendants, if they shall be held bound to seek information wherever

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Plaintiffs may suggest that it can be found. They may be required to search for the Plaintiff's evidence: in a question of pedigree, could the Defendants be compelled to examine parish registries, accessible to both parties, for the purpose of answering when parties were baptized, or died? The information sought by these interrogatories is within the reach of the Plaintiff, by subpoena duces tecum. Messrs. *Dawson & Co.* are mere witnesses. The connection of solicitor and client between them and the Defendants has long ceased. This fact distinguishes the present case from *Taylor v. Rundell* (a), where the information was to be obtained from the then agent of the Defendant: the Lord Chancellor there rests the right of the answer expressly upon the power of the Defendant to give it (b); and being in the knowledge of his own agent, it was to be presumed that he could give the discovery. In this case, the Defendants have no power to require *Dawson & Co.* to give them any information on the alleged circumstances. In *Christian v. Taylor* (c), where the Plaintiff and Defendant had the same means of ascertaining the particulars required, the Court refused to throw upon the Defendant the burden of procuring the information. *Farquharson v. Balfour* (d), and *Freeman v. Fairlie* (e). The solicitors in this case "were also solicitors for both parties; and disclosure [*103] at the suit of either, would be a breach of confidence.

Mr. *Temple*, and Mr. *Tripp*, for the Plaintiff.

The Defendants are bound to shew, at least, that they have made some attempt to acquire a knowledge of the facts in question; for it is admitted that Messrs. *Dawson & Co.* were their solicitors at the time of the transaction. It is not necessary, in this case, to say what the rule may be where the information is in the possession of one wholly a stranger.

VICE-CHANCELLOR;—

The only question in this case is, whether the answer going only

(a) Cr. & Ph. 104; *S. C.* on motion for production, 1 Y. & Coll. C. C. 123.

(b) Cr. & Ph. 113.

(c) 11 Sim. 401.

(d) 1 T. & R. 190.

(e) 3 Mer. 44.

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to the personal knowledge, information, and belief of the Defendants, is sufficient; or whether the Defendants ought not to have ascertained, or made, at least, an attempt to ascertain, by inquiry of their late solicitors, what are the facts which are made the subject of charge and interrogatory. I think it must be taken as admitted, that Messrs. *Dawson & Co.* were the solicitors of the Defendants, and as between the Plaintiff and the Defendants, the question of privilege which was suggested in argument, does not necessarily arise (a). I should also guard myself against being understood to express any opinion that a Defendant is bound, in all cases, to seek information which is equally accessible to both parties, and which is not either in his own possession or knowledge, or that of his agents, or of persons within his control, or for whose acts, with reference to the matter in question, he is answerable. Take

for example the case put in argument:—I do [*104] “not think that the Plaintiff, calling on the Defendant to state whether a person did or not die on a certain day, as a general rule, has any right, in order to procure that information, to require him to examine the parish register. But how does the case stand, regard being had to the simple fact, that Messrs. *Dawson & Co.* were the Defendant’s agents? Suppose the extreme case of the vendor of an estate selling it through his agent,—the whole matter being transacted between the purchaser and the vendor’s agent,—and suppose the agent, by gross misrepresentations, to induce the purchaser to give for the estate a price ten times the value. If the purchaser, in such a case, filed a bill to have the transaction set aside on the ground of fraud, it could not be sufficient for the vendor, by his answer, to say, that he did not know whether his agent made such false representations or not. The sufficiency of the answer would be at once tried, by inquiring whether, if the Defendant had put in an answer, saying that he had been informed by his agents, and believed it to be true, that such misrepresentations were made, that would or would not be material. In the case of a mere witness, the statement might not bind the Defendant; but that

(a) See 1 Myl. & K. 101.

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which an agent said, in the case I have supposed, would bind his principal; and for that reason, the admission, that the Plaintiff was informed, and believed the agent did make the misrepresentation, would be material. It is impossible the Court can, in this case, say that the letters or communications which passed between the Plaintiff and the agents of the Defendants may not, if admitted, be sufficient to entitle the Plaintiff to a decree.

The Defendants are bound to give some information by their answer, or to say that they have made the attempt to procure it, but have failed. It is not sufficient for one party, acting by his agent simply, to tell the other party that he does [*105] not know what his agent did. I proceed on the ground, that the acts of the agent would bind the principal; and the answer as to those acts may, therefore, be material evidence for the Plaintiff. I think the point is not new, although I am not aware of any reported case upon the subject.

It was said, that the Plaintiff might himself make the inquiries of the solicitors, and might call them as witnesses. The answer to that argument is, that the Plaintiff is, in this Court, entitled to an answer from the Defendant, not only in respect of facts which he cannot otherwise prove; but also as to facts, the admission of which will relieve him from the necessity of adducing proof from other sources (a).

Exceptions to the Master's Report overruled.

*MORLEY v. COOK.

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1842: 17th, 19th, and 23rd December.

Vendor and purchaser.—Conditions of sale.

A condition of sale was that in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove the vendor might rescind the contract, on notice and repayment of the deposit to the purchaser; and

(a) See *Brereton v. Gamul*, 2 Atk. 241; *Finch v. Finch*, 2 Ves. 492.

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objections not delivered within fourteen days after delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, and the vendor answered the queries; the purchasers on the same day objected to the answers: the correspondence on the subject of the title continued for several weeks, and then the vendor gave notice that he rescinded the contract:—*Held,*

That the continuance of the treaty for the completion of the title, after the first objection of the purchaser, was a waiver of the condition as to the rescinding of the contract.

That such a condition of sale ought to be discouraged; and ought not to receive a construction oppressive on the purchaser.

That the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition.

That the vendor was only bound bona fide to deliver an abstract of such title as he had at the time of delivering it; and so long as the condition remained in force, was not bound to deliver any supplemental abstract of title afterwards acquired; *semble.*

Whether the benefit of the condition would not in equity be forfeited by a vendor who designedly delivered an imperfect abstract of the title which he had at the time of delivering it; *quære.*

THE sale of certain property, and amongst the rest of a leasehold estate, was announced to take place by auction, on the 14th of January, 1841, according to stated conditions, the sixth of which was as follows:—That the vendor of the freehold will deliver to the purchaser an abstract of his own conveyance; but all other abstracts, or the inspection of any other deeds or documents, or other evidence of title whatever, that may be required, are to be prepared and obtained at the purchaser's expense. That each vendor of the leaseholds will deliver to the purchasers an abstract of the lease under which such vendor holds the premises, and such purchasers shall not require the production of the lessor's title, nor the production of any deeds or documents in any of such leases, or intermediate assignments recited or referred to, nor require any indemnity against any rents or covenants to which the premises may, with others, be subject or liable to; and the production of the last receipt for rent shall be conclusive evidence that the covenants contained in the leases have been fulfilled. All attested, official, [107] or other copies or extracts from deeds, wills, or other documents, and all deeds of covenant for the production

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of title-deeds or documents as respects all the lots, are to be prepared at the purchaser's expense. In any case where the title deeds relate to other property, the vendor will retain the same, and, if required, covenant for their production. And in case any of the purchasers shall raise objections not herein provided for, and which the vendors shall not be able or willing to remove, the vendors shall be at liberty to rescind the contracts, by writing under their hands, on repaying to such purchaser or purchasers his or her deposit, without interest, costs, or further compensation, and all objections not made in writing and delivered to the vendors' solicitors within fourteen days after the delivery of the abstract shall be treated as waived; in this respect time shall be deemed the essence of the contract.

On the 25th of January, the vendor delivered an abstract, which was returned with queries on the 6th of February. The abstract was re-delivered, with answers to the questions on or before the 17th of February, and on the 17th of February the purchaser objected to the answers as insufficient. A correspondence on the subject then took place between the parties, and continued until the 25th of March, when the vendor giving some further explanation respecting the title, in a letter to the solicitor of the purchaser, added—"If your client is unwilling to complete the purchase with the above answers, I must avail myself of the power contained in the 6th condition of the above particulars of sale, to rescind the contract."

On the 21st of May, 1841, the purchaser filed his bill against the vendor for a specific performance of [108] the contract of sale (a). On the hearing,

Mr. Teed, and Mr. Bilton, for the Plaintiff, argued that the

(a) The bill charged the vendor with fraud in not stating, in his abstract, deeds which he had and which would have removed objections. It was not argued, that this frame of the record precluded relief on the simple ground of contract (as in *Whitworth v. Gauguin*, 1 Cr. & Ph. 333). The vendor said he had made out the best title in his power. This was immaterial to the principal point of construction on which the case is reported.[1]

[1] Notes 1 & 2 to the case of *Tanner v. Smith*, 10 Sim. R. 412, vol. 16 of this

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vendor having continued the treaty beyond the time specified, and thereby led the purchasers into further expense, in anticipation that the contract would be fulfilled, could not afterwards avail himself of the 6th condition, and retire from the contract. *Tanner v. Smith* (a); *Page v. Adam* (b); *Cutts v. Thody* (c); *Hodson v. Bell* (d)

Mr. *Sharpe*, and Mr. *Glaspe*, for the Defendant, insisted upon the plain and district terms of the 6th condition, enabling the vendor to rescind the contract. *Williams v. Edwards* (e); *Bennett v. Fowler* (f); *Sainsbury v. Jones* (g). The point did not call for decision in *Tanner v. Smith*.

VICE-CHANCELLOR:—

The Plaintiff has in this case insisted, that according to the judgment of the *Vice-Chancellor of England*, in *Tanner v. Smith*, upon a condition very similar to the present, the vendor must at once elect between one of two courses, when objections to the title [*109] are taken;—first, waive his right to insist upon the condition enabling him to rescind the contract; or, secondly, put an end to the contract, and thereby relieve the purchaser, as well as himself, from the pendency of it. On behalf of the vendor it was argued, that the question of the effect of the condition did not, in fact, judicially arise in the case of *Tanner v. Smith*; the bill in that case having been brought by the vendor, who could not have insisted, by his own bill, upon exercising his right to rescind under the condition. My own impression (having been counsel in the appeal motion) is, that the question did distinctly arise, and that it was decided by the *Vice-Chancellor* in the way which the Plaintiff has contended. The argument for the purchaser in that case was, that, under the condition in question, the vendor had a right to rescind the contract at any time before the decree, and that it would be unjust that a vendor retaining such a right should keep the deposit.

(a) 10 Sim. 401.

(c) V. C. England, 3rd December, 1842.

(e) 2 Sim. 83

(g) Id. 462.

(b) 4 Beav. 269.

(d) 2 Beav. 17.

(f) 2 Beav. 302.

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The *Vice-Chancellor* held, that the vendor was not in a position to rescind the contract. He said the condition was waived by the vendor, and he granted the injunction to restrain the action for the recovery of the deposit, thereby deciding against that construction of the condition for which the vendor now contends (*a*). It was with reference to that argument that Lord *Cottenham* *said, "This case shews the inconvenience of hearing the [*110] merits of a cause upon motion;" and he said, that whether the vendor did or did not retain the right to rescind the contract, (not having rescinded it upon the first objection), he had reserved to himself the right to contend that he was in a position to rescind the contract to the latest moment; and that it would be unjust to allow a vendor in such circumstances to keep the purchaser's money in his pocket. Lord *Cottenham's* judgment, however, neither overruled nor disapproved of the *Vice-Chancellor's* opinion of the construction and effect of the condition.

The case of *Page v. Adam*(*b*) at the Rolls, which was cited for the Plaintiff, may, perhaps, raise a question whether Lord *Langdale* agrees with the *Vice-Chancellor* in the construction of the condition as expressed in *Tanner v. Smith*. The *Vice-Chancellor* held, that a treaty and correspondence between the vendor and pur-

(*a*) During the argument of *Tanner v. Smith*, 15th January, 1840, the *Vice-Chancellor of England* having expressed an opinion to the effect which is reported (10 Sim. 411), that when objections are delivered, the vendor, under the 7th condition had then the opportunity of deciding whether he was able and willing to remove them, the following observations passed:—

Mr. *Jacob*.—The vendor may deliver a supplemental abstract, which may fail still to make out his title.

VICE-CHANCELLOR.—It seems to me a condition which is capable of being exercised at one time only. when objections are delivered and the vendor says—"I am able and willing to remove them," he cannot afterwards rescind the contract.

Mr. *Jacob*.—If he at that time thinks himself able, and proves not to be able may he not afterwards exercise the option?

VICE-CHANCELLOR.—My opinion is, that the 7th condition applies to the mode in which the vendor chooses to deal with the objections. If he says that he is able and willing to remove them, he is excluded at any time afterwards, whether upon the same objections or future objections, from availing himself of that condition to rescind the contract on the ground that he is not able or willing. Repr. MS.

(*b*) 4 Beav. 269.

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chaser, after the first object taken, with a view to complete the title, was a waiver of the condition. It was not meant, in *Page v. Adam*, to decide that the vender could take the condition after he had waived it; and the cause rather points to the conclusion, that Lord *Langdale* did not consider the treaty and correspondence as necessarily a waiver; and his observations about the good faith [*111] of the proceeding on the part of the vendor, "point the same way. In that case, an abstract was delivered and returned in due time with observations and queries. Answers to the queries were returned. Upon these answers, observations were made; and it was with reference to these last observations that the vendor's solicitors claimed a right to rescind the contract: that case would rather impeach than confirm the authority of *Tanner v. Smith*.

If, however, I am to follow *Tanner v. Smith*, I can only do so by rejecting the second part of the Plaintiff's argument in which (for some purpose of this suit) he imputed fraud to the vendor in the suppression of part of his abstract. It was said that the vendor was bound to furnish the purchaser with a perfect abstract of his title; and that the vendor was not bound to deliver his objections until such perfect abstract was delivered, *Hobson v. Bell* (a); that in this case a perfect abstract had not been delivered; and, therefore, that the time for delivering objections had not yet expired.

If by the expression "perfect abstract" is meant the most perfect abstract in the vendor's possession (actual or constructive) at the time of his delivering it, I should probably accede to the Plaintiff's argument; for, undoubtedly, a Court of equity would not permit a vendor, who had a good title, and the means of shewing such title on his abstract fraudulently to deliver an imperfect abstract to which objections would necessarily be taken; and, upon these objections being taken, avail himself of his own fraud to avoid his contract, under the condition. In any other sense of the words "perfect abstract," I should have difficulty in following the argument. A perfect abstract in the strict sense of the term would "shew a good

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(a) 3 Beav. 17.

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title ; but the conditions clearly mean to provide for the case of an abstract not shewing a good title.

It is clear, however, that it was not in any qualified sense of the term that the expression "perfect abstract" was used in argument. The argument was that the vendor had been guilty of a fraud (depriving him of the benefit of the condition in question), because he had withheld from the purchaser a policy of assurance and a conveyance of the equity of redemption of the purchased premises, both of which were, *ex concessis*, obtained by him in the month of March, 1841. Now it appears to me impossible to hold that the vendor was under an obligation to deliver these documents, if the argument derived from *Tanner v. Smith* be right. The vendor cannot be bound to do more than, bona fide, deliver such abstract of title as he has at the time of delivering it, if (as the purchaser contended) the effect of doing more towards the completion of the title, in answer to the purchaser's requisition, is to have the effect of a waiver of any condition of sale.

It was attempted to reconcile the argument I have adverted to, with *Tanner v. Smith*, by saying, that the days within which the purchaser was bound to take his objection must be computed from the time when a perfect abstract was delivered ; and that, if the vendor made any addition to the abstract first delivered, a new period of fourteen days would run in the purchaser's favour, from the time of delivering such addition. That the purchaser must be at liberty, after addition to the abstract, to take new objections to the title, (at least to the extent of objections arising upon or out of the additional matter), cannot be disputed. But if I am to understand the purchaser as admitting that every answer, (not being [118] merely argumentative) which the vendor gives to the purchaser's requisition, and to that length the argument went, is to be considered as an addition to the original abstract, giving the purchaser under the condition of sale a new period of fourteen days, within which to take objections to the abstract originally delivered, I cannot but think that *Tanner v. Smith* is given up altogether by the argument ; for, if the conditions are held to apply to that new state of circumstances, so as to give or rather limit the purchaser to the

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fourteen days, prescribed by the conditions for taking objections to the title, it appears to me irresistibly to follow, that the vendor must have a new right to rescind the contract, upon the new objections being taken. So long as the purchaser's right to object to the title upon the footing only of the conditions of sale is claimed,—so long the right of the vendor to rescind the contract under the same conditions in answer to the objections must remain. Those who rely upon *Tanner v. Smith*, must, for the purposes of their argument, contend, that the vendor in this case had delivered his abstract; or, at least, that whatever the rights of the purchaser might be, the vendor was estopped from saying he had not delivered an abstract,—that by treating for the completion of the title, after objections taken, he had waived his right to rescind under the condition, and that all parties were consequently remitted to the ordinary rules of a Court of equity, in reference to questions of title, unfettered by the particular conditions of sale.

I shall, therefore, pass by the imputed fraud, and return to the consideration of the actual position of the parties in this case.

Upon many of the possible cases alluded to, I need not [*114] express a decided opinion. I agree that a vendor, "in a case like the present, is bound to deliver the best abstract that he can; and a Court of equity would not do a very violent act in holding, that a vendor who, under conditions of this kind, having a perfect abstract, fraudulently delivered one which was imperfect, had, by such fraudulent breach of the conditions on his part, forfeited the benefit of the conditions in his favour.

No question however can arise upon that point, because it is not suggested, that the vendor, at the time he delivered his abstract, was in the possession of any better or other abstract than that which he delivered. Nor is it necessary I should say in what manner the Court would deal with a case in which a vendor acting bona fide should deliver a second abstract (properly so called) after objections taken to a first abstract. For the purposes of the present case, I assume that the abstract delivered by the vendor, was his abstract of title, or, at least, that he is not in a condition to say that it was not. The case is then reduced to the same point which arose in

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Tanner v. Smith; namely, an abstract delivered,—objections taken to it by the purchaser,—answers (not merely argumentative) to the purchaser's requisitions, furnished by the vendor,—and a correspondence and treaty between the vendor and purchaser continued down to the 25th March, upon the footing of the vendor proceeding to complete his title. The question is, whether such correspondence and treaty, after the first objections were delivered, is or is not a waiver of the 6th condition,—which involves the preliminary question, whether the 6th condition is not confined to the objections first taken after the abstract is delivered. I cannot say that the language of the 6th condition imperatively decides the question. Nor can it, on the other hand, be denied that the language of the 6th condition "is consistent with the construction [*115] put upon it in *Tanner v. Smith*, or that such construction reaches the reasonable and probable intention of the parties. Nor am I prepared to say, that the interests of a purchaser might not in many cases be best consulted by a different interpretation of the condition; nor that a skilful practitioner may not in all cases by the addition of a few words in his answer to objections to title, such for instance as "without prejudice," obviate the effect of the rule laid down in *Tanner v. Smith*. But I am bound to come to that conclusion which, with reference to the majority of cases, appears most consonant to justice. Proceeding upon that principle, I have no hesitation in saying that I think conditions of sale like those before me (the meaning of which no purchaser knows until ex post facto decisions of a Court of justice informs him of it) ought to be discouraged, and that I am but offering such discouragement by putting a strict construction upon them in favour of a purchaser, and by holding that they are not to have a construction which might subject purchasers to a great expense and inconvenience at the mere will of a vendor;—that the 6th condition in this case ought to have that construction which the *Vice-Chancellor* put upon a similar condition in *Tanner v. Smith*;—that a treaty between the vendor and purchaser for the completion of the title by the former, after the purchaser's objections have been taken to the abstract, ought to be

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deemed a waiver of that condition ;—and that in equity, as at law, the condition once waived is gone for ever.

I have reason to know that the *Vice-Chancellor* remains of the opinion correctly attributed to him in *Tanner v. Smith*, and that he intended to re-assert the same opinion in the late case of *Cutts v. Thody*.

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*CURD v. CURD.

1842: Dec. 22.

Motion under the 5th Order of the 9th of May, 1839, for special accounts and inquiries, not merely preliminary to the decision, at the hearing, of the questions in the cause, but involving the decision of some of those questions, refused.

A SUIT by one of several residuary legatees against the widow, who was a devisee in trust of the real estate, and executrix, charging various acts of neglect and default, and praying that the accounts might be taken, and new trustees appointed. The answers admitted that the Plaintiff was a residuary legatee.

Mr. *Cooke*, for the Plaintiff, moved under the Order V. of the 9th of May, 1839, for a reference to take an account of the personal estate of the testator come to the hands of the executrix, and of her disposition thereof, and of the outstanding personal estate, with a direction to distinguish such parts, the use whereof was not,—from such parts the use whereof was,—specifically bequeathed to the Defendant; and what had become thereof respectively; and to take an account of the testator's debts, &c.; and an account of the profits made by the Defendant, from the carrying on, by her, of the testator's trade; and of the parts of the real and personal estate used by her in carrying on the same; and to inquire whether the Defendant had, for any and what time, maintained and educated the testator's children; and to take an account of the real estate, and of the rents and profits received by the Defendant; and of the freehold or leasehold estate sold, and when, and to whom, and for what sums of money, and when received. And what children of the tes-

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tator were living at his decease; and whether any, and which of them, attained the age of twenty-one; and when the youngest attained twenty one; and which of such children had died since the death of the testator; and if sons, whether they attained that age; and if daughters, whether they attained [*117] that age or were married, and who were their legal personal representatives; and whether any of such children died intestate as to his interest in the testator's real estate; and who is entitled to the interests of such deceased children in the real estate, either as devisees or heirs-at-law of such deceased children respectively; and whether the Defendant had laid out any and what part of the capital of the estate in the purchase of any and what leasehold premises, or in the erection of any and what buildings thereon, or on any part of the testator's estate; and of the rents and profits thereof received by the Defendant.

Mr. *Lewis* opposed the motion, as involving, if granted, a decision of questions in the cause; and, therefore, not merely preliminary to the decision of such questions.

The cases cited were, *Topham v. Lightbody* (a), and the cases there cited; *Strother v. Dutton* (b); and *Teague v. Richards* (c)[1].

THE VICE-CHANCELLOR, after shewing from the pleadings, that the greater part of the inquiries specified in the notice of motion could not be directed without assuming points in dispute in the cause, refused to direct any inquiries, except as to what children of the testator were living at his decease; and which (if any) of them had since died; and who were their personal representatives.

(a) Vol. L, p. 289.

(b) 10 Sim. 288.

(c) 11 Sim. 46.

[1] In *Strother v. Dutton*, 10 Sim. 288, it was held that under the 5th order of May, 1839, the court will order preliminary accounts to be taken, although the cause has been set down for a hearing. But in *Meinertzhagen v. Davis*, 10 Sim. 289, the Vice Chancellor held, that the court, under this order, would not direct preliminary inquiries to be made unless it was plain that they would be directed at the hearing, and would be binding on the parties to the suit. See also two next pages, 118, 119.

1843.—Breeze v. English.

BREEZE v. ENGLISH.

1843: 2nd and 3rd March.

Motion for inquiries, as preliminary, under the 5th Order of the 9th of May 1839, refused, where the necessity of the inquiries would depend upon a certain effect being given to a will of difficult construction.

Mr. *Elderton* moved, on behalf of the Plaintiff, under the Order V. of the 9th of May, 1839, for a reference to inquire "whether *A.*, in the pleading named, is living or dead; and if dead, when he died, and whether testate or intestate, and married or unmarried; and who were, and are, his heirs-at-law and next of kin, and legal personal representatives; and whether the Plaintiffs *B.*, and *C.*, his wife, or the Plaintiffs *D.*, and *E.*, his wife, have executed any and what settlement respectively, affecting their interests in the hereditaments in the pleadings mentioned; and also whether *F.*, in the pleadings in this cause named, is alive or dead; and if dead, when she died, and whether leaving any and what issue; and whether the said *F.* exercised the power of appointment, alleged to have been reserved to her by the settlement alleged to have been executed, of her interest in the said hereditaments."

Mr. *J. Hill* opposed the motion, and cited *Frost v. Hamilton* (*a*); *Warner v. Moore* (*b*); and *Logan v. Baines* (*c*).

[The argument then proceeded on the question, whether, upon the construction of the will under which the parties claimed, the inquiries would or not ultimately need to be made.]

[*119] *VICE-CHANCELLOR :

The inquiries asked by this motion may or may not be ne-

(a) 4 Beav. 33.

(b) V. C. England, 22 July, 1841. Foreclosure suit. Motion by the Plaintiff for an inquiry who was the heir-at-law of the mortgagor, suggesting that it was doubtful whether a Defendant before the Court in that character was the heir. Refused with costs. Repr. MS.

(c) 10 Sim. 604.

1842.—Collinson v. Ballard.

cessary ; but that question the Court cannot determine, without, in the first place, deciding upon the effect of a will, the interpretation of which will be a matter of much difficulty, and is open to very great argument. I shall not make any order upon the motion, but reserve the costs of it until the hearing.

COLLINSON *v.* BALLARD.

1842 : 23rd December.

Inquiries of the propriety of the proceedings proposed to be taken for the beneficial management and realization of the estate of a testator or intestate, will not be directed in a creditor's suit.

ON the hearing of a creditor's suit, a decree was proposed to be taken, which, after directing the usual accounts, proceeded to refer it to the Master, to inquire whether it would be for the benefit of the estate, that any proceedings should be taken for the purpose of completing certain buildings which the intestate had entered into covenants to erect by a certain time ; and also for recovering the possession of some deeds or documents relating to property belonging to the estate of the intestate.

Mr. *Goodeve*, for the Plaintiff.

Mr. *F. J. Hall*, for the administrator, said that both of the parties in the cause were desirous that the inquiries should be made in the suit, and that such a course would be beneficial to the estate, and, therefore, to the creditors.

THE VICE-CHANCELLOR refused to direct the proposed inquiries, and said that they would be improper "in a [*120] creditor's suit, the only object of which was, the payment of the Plaintiff's debt. It was only in an administration suit, in which the persons interested, as the residuary legatees, or next of

 1842.—Pinkett v. Wright.

kin, were parties, that the Court interfered with the proper duties or discretion of the executor or administrator in the control of the estate. [1]

 PINKETT v. WRIGHT.

8th, 9th, and 10th Nov. 3rd, 10th, and 19th Dec.

Trust-funds were invested in the purchase of transferrable shares in a Banking Company, in the name of one of the trustees, who executed a declaration of trusts thereof, (the rules of the company not allowing shares to stand in the name of joint-owners or cestui que trusts). The trustee was also a proprietor of shares in his own right in the same Company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital, expressed by quantity. The trustee contracted to assign a certain number of shares to the Banking Company as a security for advances which they made to him: he afterwards became bankrupt.

Held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and, so far as he had shares of his own, not to have transferred or pledged the shares of his cestui que trusts.

That, therefore, the cestui que trusts were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy, as could be presumed to be identical with the shares in which the trust-funds were invested, from the fact that such a number of shares had always thenceforwards stood in the name of the trustee.

That having regard to the deed of association, the Banking Company had no alien founded on the general relation of partnership, on the shares of a proprietor, in respect of a debt owing by the proprietor to the Company.

That the right which the directors of the Banking Company might have, under the deed of association, of withholding their approval of the transfer of shares, cannot be exercised for the purpose of previously obtaining payment of a debt due to the Bank, from the proprietor whose shares are proposed to be transferred.

That the equitable title of the cestui que trusts to the shares purchased with the trust-funds was perfected, without notice to the Banking Company, by the execution of the declaration of trust thereof.

That the special contract by the proprietor to assign his shares to the Banking Company, as a security for their advances, gave the Bank a lien on the shares then standing in the name of the proprietor, of which he was the beneficial owner; and that the same were not in his order and disposition at the time of the bankruptcy. *Semble*.

[1] See *Hatcher v. Stevenson*, 3 Hare, 267.

1842.—Pinkett v. Wright.

By a settlement, dated the 3rd of April, 1828, *Francis Johnson* vested certain foreign stocks in *John Wright* and *Henry Robinson*, upon trusts, under which, the Plaintiffs, and some of the Defendants, were beneficially interested. The foreign stocks were, in March, 1830, converted into a sum of 21,000*l.* Consols. In April, 1880, the trustees, *Wright* and *Robinson*, at the instance of *Johnson*, sold out 5,000*l.* stock, part of the said trust [*121] funds then standing in their names, and with the proceeds of the sale, and other monies voluntarily added by *Johnson*, purchased 160 shares, of 100*l.* each, in the capital of the Provincial Bank of *Ireland*, which were transferred into the name of *Wright* alone, but as trustee upon the trusts of the settlement; and the certificates of the shares were at the same time indorsed with the words, "160 Irish Provincial Bank Shares. Certificates. Name of *John Wright*, Esq., in trust for *F. Johnson*, June 8th, 1840." The certificates of the shares were deposited with, and remained in the possession of one of the cestui que trusts. On the 9th of July, 1830, *Johnson*, *Wright*, and *Robinson*, executed a declaration of trust, indorsed on the settlement, declaring that *Wright* and *Robinson*, as to the sum of 16,000*l.* Consols, residue of the 21,000*l.* Consols; and *Wright*, as to the said 160 shares in the Provincial Bank of *Ireland*, were trustees upon the trusts of the settlement. *Johnson* died in 1833, and the Defendant *Reynolds* was his executor.

At the time that the 160 shares were purchased upon the trusts of the settlement, *Wright* was also the holder of other shares in the Provincial Bank. Between that time and October, 1837, the number of shares standing from time to time in *Wright's* name varied from upwards of 700 to 225; and taking into the calculation 125 shares transferred by *Wright* to Mr. *Muspratt*, in August, 1836, and re-transferred by *Muspratt* to *Wright*, in August, 1837 (a transaction explained at the bar, as having taken place for a nominal consideration, to qualify Mr. *Muspratt* for the same office,) the number of shares standing in the name of *Wright* at the latter period was much smaller. It did not appear that any change took place in the number of 225 shares in the name of *Wright*, from October, 1837, until the time of his bankruptcy. Ev-

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[*122] ery *original share in the Provincial Bank of *Ireland* was of the nominal value of 100*l.*; and the holders of shares were the holders of proportionate parts of the capital of the Company: the particular shares which they so held were not, however, distinguishable by any mark or number; and, therefore, when a proprietor sold some of his shares, his proportion of the capital was diminished to that extent; but there was nothing to identify the individual shares, which he sold, from those which he retained. The Provincial Bank had allotted a number of additional shares of 10*l.* each, by way of bonus, to the original shares: no question arose respecting the additional shares: it being admitted that they would follow the original shares, according to the result of the claims thereupon.

On the 1st of January, 1840, *Wright*, being indebted to the Provincial Bank, agreed to assign 100 shares to the Bank, by way of security. The agreement to this effect was contained in the following letter:—

“To the Directors of the Provincial Bank of *Ireland*: Gentlemen,—As security for the sum of 4000*l.*, held by me on loan from the Bank, I hereby oblige myself to transfer unto the name of any one of your number, whenever you shall desire it, one hundred shares of 100*l.* each of the stock of the Provincial Bank of *Ireland*, now standing in my name.

“*John Wright.*”

On the 23rd of November, 1840, *Wright* and his partners, who carried on the business of bankers in *London*, stopped payment; and on the 24th of November, 1840, the Plaintiff's solicitor gave notice to the Provincial Bank of the claim by the parties interested under the settlement of the 3rd of April, 1828, to the

[*123] said 160 shares. On *the 17th of December, 1840, a fiat in bankruptcy issued against *Wright*.

The bill was filed by the parties interested under the settlement, against—the trustees, the Provincial Bank, (by *R. Murray*, their public officer), *Blount*, *Bunyan*, and the assignees of the bankrupt, —praying the appointment of new trustees of the settlement, and

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that the said 160 shares, and 32 additional shares, standing in *Wright's* name, might, subject to the lawful provisions of the deed of association, be transferred to such new trustees; and that, if necessary, the interests of the other Defendants in the shares standing in *Wright's* name, might be ascertained and declared.

The claims made to the 225 shares (and to the additional or bonus shares belonging to the original shares) standing in the name of *Wright* at the time of his bankruptcy, by the several parties to the suit, on the pleadings, and at the bar, were as follows:—

The Plaintiffs claimed 160 shares, as having been purchased with the trust funds, and beneficially vested in them by the subsequent declaration of trust indorsed upon the settlement.

The Provincial Bank claimed a specific lien upon 100 shares, under the agreement expressed in the letter of the 1st of January, 1840, for securing to the Bank the payment by *Wright* of 4000*l.*, owing by him to the Bank; and the Bank also claimed a general lien upon all the shares standing in *Wright's* name, for whatever might be due from *Wright* to the Bank, on the balance of accounts.

The Defendant *Blount* claimed 20 shares, alleging, *that, in the year 1825, *Wright & Co.*, being his bankers, [*124] purchased 20 shares with money in their hands, belonging to him that the instalments payable in respect of such 20 shares were by *Wright & Co.* as his bankers; that he was debited with the amount of those instalments, and regularly credited with the dividends upon the shares, in his accounts with *Wright & Co.*; and that *Wright* was, therefore, a trustee for him.

The Defendant *Bunyan* had claimed 45 shares; but disclaimed by his answer.

The assignees of *Wright* submitted that all the shares standing in the name of *Wright* at the time of the bankruptcy were in his order and disposition; and formed part of his estate to be distributed under the bankruptcy.

The points taken in the argument appear in the judgment.

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Mr. *Sharpe*, and Mr. *Wood*, for the Plaintiffs, cited *Ex parte Watkins* (a); *Ex parte Ord* (b); *Duncan v. Chamberlayn* (c); *Joy v. Campbell* (d); *Ex parte Horwood* (e); *Taylor v. Plumer* (f).

Mr. *Lowndes*, Mr. *Chandless*, and Mr. *Smith*, for Defendants interested under the settlement, mentioned *Liebman v. Harcourt* (g).

Mr. *Purvis*, and Mr. *Riddell*, for the Defendant *Blount*, *Meux v. Bell* (h).

[*125] *Mr. *Hurd*, for *Bunyan*.

Mr. *Teed*, and Mr. *Cooke*, for the assignees of the bankrupt.

Mr. *Russell*, Mr. *Elmsley*, and Mr. *Neal*, for the Provincial Bank. *Fereday v. Wightwick* (i); *Cook v. Black* (j); *Bignold v. Waterhouse* (k); *Clayton's case* (l); *Ex parte Masterman* (m); *Chitty on Contracts*, p. 249—259; *Fox v. Clifton* (n); *Duncan v. Lowndes* (o); *In re Caldecott* (p).

The VICE-CHANCELLOR:—

The parties in this cause claim to be entitled under specific contracts binding, or alleged to have been binding, upon *Wright*, at the time of his bankruptcy, to the number of 280 shares in the Provincial Bank of *Ireland*; whilst *Wright*, at that time, had in fact, only 25 shares standing in his name. Upon the 225 shares so actually held by *Wright*, there are, moreover, the claims of the Provincial Bank itself, and the assignees of *Wright*;—the Bank,

(a) 2 Mont. & Ayr. 348.

(c) 11 Sim. 128.

(e) 1 Mont. & M'Arth. 169.

(g) 2 Mer. 518.

(i) 1 R. & Myl. 45.

(k) 1 Man. & Sel. 258.

(m) 2 Mont. & Ayr. 209.

(o) 8 Campb. 478.

(b) Id. 724.

(d) 1 Sph. & Lef. 329.

(f) 3 Man. & Sel. 562.

(h) Ante, Vol. I., p. 78.

(j) Ante, Vol. I., p. 390.

(l) 1 Mer. 572. g

(n) 6 Bing. 726.

(p) 2 M., D. & De G. 368.

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in respect of their alleged lien, as partners, on the share of *Wright* in the concern, for the amount which may be due from him to the partnership;—and the assignees, on the ground that the whole 225 shares were in the order and disposition of *Wright* at the time of his bankruptcy. The question, therefore, between the different parties arises, in what order they are to stand, as between each other, assuming that the claim of the assignees can be excluded by the other claimants.

‘I shall consider, first, the claim of the assignees; and [‘126] having excluded that claim, as I think (subject to the points to be adverted to) it must be excluded;—secondly, I shall consider the claims of the Plaintiffs, and the Bank, as between each other, reserving during the consideration of these claims, the existing claim of *Blount*; the possible effect which *Bunyan’s* claim may have had upon the case; and the fact of the transfer of 125 shares by *Wright*, to *Muspratt* in August, 1836; and the transfer of 125 shares by *Muspratt* to *Wright*, in August, 1837. Thirdly, I will consider the case as affected by the existing claim of *Blount*, the former claim of *Bunyan*, and the transaction with *Muspratt*.

To begin with the claim of the assignees. It was admitted, and I think properly admitted, by the counsel for the assignees, that if a trust under the settlement of 1828 could be established in favour of the Plaintiffs upon 160 of the 225 shares now remaining, the assignees could not successfully contend that such 160 shares claimed by the Plaintiffs were in the order and disposition of the bankrupt; and I did not understand the assignees to have contended that the residue of the shares standing in *Wright’s* name, after satisfying the 160 claimed by the Plaintiffs, would be considered as in the order and disposition of the bankrupt, as against the Bank, who claim them under the letter of the 1st of January, 1840. If that point is contended for, I must hear counsel upon it. Now, with respect to the 160 shares, I am clear that the trust attached. But as my reasons for so concluding will appear by the observations I make upon the claims of the Bank in competition with the Plaintiffs, it will be convenient to proceed at once to the consideration of that case; for it was, in fact, only by the reference to the argument urged by the

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[*127] *counsel for the Bank, that the assignees made a case at the bar.

With respect then to the claim of the Bank,—one observation pressed upon me was, that *Wright* not being the sole trustee of the settlement, and the investment not being authorised by the trusts of the settlement, the shares could not be considered and treated as bound by that settlement. To that observation, however, which applies equally to the case of order and disposition, I can give no weight. The reason for using the name of *Wright* alone will be found in the 79th section of the deed of settlement of the Provincial Bank of *Ireland*, which requires that shares shall stand in the name of one proprietor only, though others, as joint owners, cestui que trusts, or incumbrancers, may have an interest in the shares. But that alone can give no advantage to *Wright*, or to those who claim under him. A cestui que trust may have a right to complain of an irregularity in the execution of a trust, and may repudiate an investment not authorised by the trust; but the trustee who made the investment with trust-money, and for the purposes of the trust, cannot arbitrarily say that he will claim the investment as his own, and be a debtor personally to his cestui que trust for the breach of trust he has committed. In this case, it is perfectly clear that 160 shares were purchased with the trust-money, upon the trusts and for the purposes of the settlement, and that *Wright* had bound himself to hold those shares upon the trusts of the settlement; and some of the cestui que trusts were parties to the transaction. These are the only material considerations by which the question I am now considering can be effected. It is clear, as against *Wright*, that he was a trustee of the 160 shares, although there was an irregularity in the transaction; and a trust

[*128] having clearly attached on the *property, that property is not to be considered in the order and disposition of the bankrupt trustee.

The next point I shall consider, which also involves the question of order and disposition, offers more difficulty, or rather requires more explanation, than that which I have just adverted to. It appears that the shares in the capital of the Bank are not,—as in the case in some similar concerns, the capitals of which are divided into transferable shares,—distinguished by numbers, or otherwise, from each

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other, so that a person beneficially interested in shares standing in the name of another, may be able to say which specific shares are his own. The original shares are of a nominal value: 100*l.* each, and each shareholder appears in the books of the Bank only as the holder of a certain number of shares; that is so much of the capital in the concern. But as if, as to part, he is a trustee; and, as to part, the beneficial owner, and from time to time, he buys and sells shares, sometimes holding a larger, and sometimes a smaller number, —there is nothing in the form of the transfer, or in the mode of registering the shares, from which it can be shewn, that he has sold any one specific share, rather than another. The case, in that respect, resembles that of a person who may purchase stock in the public funds, of which he is partly a trustee, and partly the beneficial owner. The whole is blended in one mass in the books of the Bank of *England*; and there is nothing either in the mode of entering the name of the holder in the Bank books, or in the form of the transfer, from which it can in any way appear, whether stock which he may sell is his own, or that of his *cestui que trust*. That fact, when the question arises, must be determined aliunde.

Having in this case come to the conclusion that the 160 shares, purchased for the trust, were in the first instance subject to the trust, I have no hesitation in presuming, as against *Wright* and his assignees, that the shares, which in the interval between the purchase of the 160 shares and *Wright's* bankruptcy were from time to time transferred by him, were shares which he lawfully might transfer. Where a party does an act which may be lawful, a Court of justice will, even in favour of the party doing it, intend that it was so, until the contrary is shewn; and a fortiori will the Court so intend in favour of a stranger, who would be injured by a different intendment. If 20,000*l.* Consols were standing in the name of a party who was trustee of one moiety and beneficial owner of the other moiety, and that party were to sell and transfer 10,000*l.* of the stock, it cannot, I think, be doubted for a moment, that a Court of equity would, as against the trustee and his assignees in bankruptcy, hold that the 10,000*l.* transferred was the property of the bankrupt, and that the remaining 10,000*l.* was not the property or in the order and disposition of the bankrupt, but was subject

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to the trust. Similar observations will apply to the claim of the Provincial Bank in respect of their lien, under the transaction of the 1st of January, 1840, which, as between the Bank on one side, and the bankrupt or his assignees on the other, I think is clearly established; and I conclude, therefore that the 225 shares standing in the name of the bankrupt, at the time of his bankruptcy, were not, nor were any of them, in the order and disposition of the bankrupt. It will be remembered, that for the present I am considering the case without reference to the claim of *Blount*, the case of *Bunyan*, and the transaction with *Muspratt*, which I shall hereafter notice.

The next point I propose to consider is, that which was ["180] rested upon the relation in which it was said that **Wright* and the Bank stood towards each other as partners. It was said, that *Wright* as a proprietor of shares in the Bank was a partner with the other proprietors of shares—that by the general rules of law which regulate the rights of partners inter se, persons claiming an interest in *Wright's* shares could only claim such interest subject to all the equities between *Wright* and his partners; and that, by such general law, without any special contract, the money owing by *Wright* to the Bank was a charge or lien upon his interest in the capital of the concern, which would justify the Bank in refusing to transfer his shares until the debt was paid. This argument I have had little hesitation in rejecting. In the case of ordinary partnerships, a partner can retire and withdraw his capital from the concern, only upon a dissolution of the partnership; and it is upon taking the general partnership account between the parties, that the right of setting off the debt of each partner in account with the partnership arises. The essential distinction between a partnership like that of the Provincial Bank of *Ireland*, and an ordinary trading partnership, consists in the power and privilege which by the provisions of the deed of settlement are given to a proprietor to retire and withdraw his capital from the concern, without a dissolution of the partnership, by transferring his shares to another. This power and privilege constitute very main inducements to the investment of capital in concerns like that of the Provincial Bank of *Ireland*, and thereby enable the society or partnership to raise a capital and

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carry on transactions, which it would be impracticable to raise or carry on upon the basis of an ordinary mercantile partnership. The consequences which, as between a shareholder and the Company, arise by operation of law alone upon a transfer of shares, cannot therefore be inferred from those which attach upon the dissolution of an ordinary partnership. There *is an [*181] absence of that analogy between the cases which would support such an inference. The consequences arising upon a transfer of shares must be sought for in the provisions of the deed of settlement, or in some rule of law not repugnant to those provisions. Now, after a perusal of the deed of settlement constituting the Provincial Bank of *Ireland*, I have come to the conclusion, that a right like that claimed by the Bank in this case against the Plaintiffs, would be repugnant to the scope and provisions of the deed of settlement, and that such claim cannot be sustained except by special contract. In the absence of any special contract, giving the Bank a lien upon the shares of a proprietor in respect of money lent by the Bank to such proprietor, I am satisfied the proprietor must be considered and treated by the Court as any stranger who might borrow money of the Bank in the course of their ordinary dealings as a Bank with a customer.

In order to explain the grounds of the conclusion I have stated, I shall notice shortly some of the provisions of the deed of settlement of the Provincial Bank, which have led me to that conclusion. The deed recites the statutes 1 & 2 Geo. 4, c. 72, and 5 Geo. 4, c. 78: it then recites the 6 Geo. 4, c. 42, which statute itself recites the formation of the Company, under the two preceding acts, and empowers any member of the Company to sell and transfer his shares in the stock of the concern, subject to such regulations, and under such restrictions, as might be required by the constitution of the society. The deed then provides that the concern shall be carried on under the provisions of the last-recited act; that the business of the concern shall be that of bankers: it appoints directors, and regulates the mode in which the concern shall be carried on by the directors; requiring all sales and transfers *of [*182] shares to be registered at the Stamp-office. The 65th

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section empowers the Court of Directors to declare equal dividends on each share in the capital; and by the 66th section, every dividend declared is made payable at the office of the Company, within one month after it is declared. By the 68th section, the directors have power to advance money by way of loan upon securities of any description,—a clause I refer to only for the purpose of shewing, that loans of money to the customers of the Bank were within the scope of its dealings. Sect. 79:—Shares are to stand in the name of one proprietor only, although others may be interested in the shares jointly, or as cestui que trusts. Sect. 81:—Every proprietor is entitled to one certificate, or set of certificates, that he is a shareholder; but no duplicate certificates are to be given. Sect. 87:—In the case of the bankruptcy of a proprietor, indebted to the concern, the directors may appoint a person to prove against his estate for any private debts owing from him to the Bank. By sect. 119:—Payment to the registered proprietor is to be a good discharge to the Company, as against cestui que trusts, incumbrancers, and other persons interested in the shares. By the 120th section, legatees and next of kin; and by section 121, the husband of a female proprietor, are not to be proprietors, as such; but the executors in the former case, and the husband in the latter, may procure persons, to be approved of by the Company, to be admitted proprietors. So, by sect. 123, may the assignees of a bankrupt or insolvent proprietor. Sect. 125;—Any proprietor may procure some other person to become a proprietor in respect of his shares, or sell to the directors, if they can agree as to the price. The 134th section provides, that all dividends and other profits which may be declared or appropriated, on any share or shares of any female, or deceased, or bankrupt, or insolvent proprietor, in the interval between the [*188] time of her marriage, or of the death, bankruptcy, or petitioning for the benefit of any act for the relief of insolvent debtors, and of some person becoming a proprietor of such share or shares, shall not be received; neither during such interval, shall the rights and privileges attending such share or shares be exercised by any person or persons whomsoever, but the same respectively shall remain in suspense; and so soon as any person shall be

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come a proprietor of such share, or of any shares ; the husband of any such female proprietor, or the executors or administrators of any such deceased proprietor, or the assignees of any such bankrupt or insolvent proprietor, shall, on payment of all the instalments which may have been previously called for, and may then remain unpaid on such share or shares, be entitled to receive the dividends and other profits which may have been so suspended. It is observable, therefore, that an absolute power of alienation is given to every proprietor of shares, subject only to the approval, on the part of the Company, of the person to be admitted in the stead of the retiring proprietor. Provision is made for the proof of any debt owing to the Bank by a bankrupt proprietor ; but no provision for satisfying the demand of the Bank out of the share of the proprietor ; nor, in any one of the clauses providing for the admission of purchasers of shares of assignees or executors, is any provision made, except in the 134th section, whereby the Company is empowered to apply dividends in payment of instalments due upon shares ; but for that purpose only. Trusts of, and incumbrances upon shares are recognized, but no protection to the cestui que trusts, or incumbrancers, against the ordinary dealings of the Bank with a proprietor, as one of its customers, is expressed. I cannot read these particular provisions, in connexion with the general scope of the deed, and the statutes under which the Company was formed, without being judicially persuaded, "that the intention of the par- [*184] ties to the deed of settlement was, to assimilate the position of the proprietors, as between themselves and the company, to that of the proprietors of Bank Stock, or East India Stock, who,—as between themselves and the corporation, whose stock they hold,—may transfer that stock without being subject, by any general rule of law, to have the right of transfer controlled or affected, because the proprietor may, in respect of some private transaction, be indebted to the corporation. I think the recent statutes 1 & 2 Vict. c. 96, 2 & 3 Vict. c. 68, and 3 & 4 Vict. c. 111, are to some extent legislative declarations to that effect ; for I cannot suppose that the legislature intended, by those statutes, to alter, by an *ex post facto* law, the existing contract between the parties concerned, or do

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otherwise than carry out its spirit and intention. I may refer, on this point, to the case *In re Caldecot*(a).

I may observe, with reference to observations which were made at the bar,—not that I think the point material,—that although the Provincial Bank of *Ireland* is not a corporation, the Court of Directors is empowered by the 90th section, to apply for an act of Parliament, or charter of incorporation.

I conclude, for the reasons I have stated, that the Bank is not entitled to a priority over the Plaintiffs, in respect of any general rule of law arising out of the partnership contract between the Bank and *Wright*. I conclude, in effect, that in respect of all dealings between the Bank and a proprietor, for or in respect of his shares, the bank must be considered as a stranger, dealing in like manner, would be. The Bank must establish its rights to, or lien upon, the shares of a proprietor, by special contract, as a stranger would be compellable to do.

[135] The question then is, whether the Bank has established a priority over the Plaintiffs, by the specific contract between *Wright* and the Bank, of the 1st of January, 1840?

That the Bank has established an interest in *Wright's* shares, as against *Wright* and his assignees, admits of no doubt; subject to the question on which, as I have said, the assignees may, if they desire it, be still heard. The claim of priority over the Plaintiffs, however, depends upon other considerations. The claim was rested upon the suggestion, that the Bank had the legal interest in, or control over, *Wright's* share, both as holders of the capital in the concern, and by the power the Bank has to refuse to permit a transfer of the shares; and it was said, that the equities between the Plaintiffs and the Bank were the same, and that a Court of equity would allow the Bank to retain any advantages which its position gave it. My answer to this argument will be found in the observations I have already made. From October, 1837, to the 1st of January, 1840, *Wright* was a trustee for the Plaintiffs of 160, part of 225 shares, standing in his name. I have already stated the grounds upon which

(a) 2 M., D. & De G. 368.

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I consider the shares comprised within the trusts of the settlement of April, 1828, to be identified with those comprehended in the 225 that stood in *Wright's* name on the 1st of January, 1840. When *Wright* therefore, on that day, agreed to pledge 100 shares to the Bank as a security for his private debt, he agreed, to the extent of 35 of those shares, to pledge shares of which he was trustee for the Plaintiffs. This he could not be either compelled by the Bank, or permitted by this Court, to do, unless the Bank (considered as a stranger advancing money upon the 100 shares it claims) could establish a better equity than that of the Plaintiffs, to call for a transfer of the 35 shares in dispute. For the [136] reasons I have already stated, I cannot consider the Bank as standing in a better situation than a stranger would stand, in respect of any contract with a proprietor for the transfer of his shares. Now, I can discover satisfactory ground upon which, as between the Plaintiffs and the Bank, I can deprive the former of that priority which time and dates *prima facie* give them. The persons to whom the security is given by *Wright*, on behalf of the Company, are the directors of the Company. *Wright*, who is the author of the wrong of which the Plaintiffs complain, by a letter addressed to the directors of the Company, of whom he is one, engages that property, of which he is trustee, shall be transferred to himself and his co-directors; and that, for purposes in which he is beneficially interested. I think that the position of the parties (no transfer having been made) is sufficient to leave the Plaintiffs in possession of the original priority which time alone would give them.

In coming to the conclusion which I have stated, I do not rely upon the doctrine of constructive notice arising from *Wright's* position, either as a partner, or a director. The directors who took the security from *Wright*, are purchasers of trust property; one of whom knew that it was trust property. Admitting, for the purposes of the argument, but not farther, that the Plaintiffs had not perfected their equitable title by notice to the Bank (if I can consider the Bank as unaffected by notice), I think, under such circumstances, the claims of the Plaintiffs cannot be postponed to that of the Bank. But I by no means admit that any such notice to the Bank was

 1842.—Pinkett v. Wright.

necessary to perfect the Plaintiffs' equity, as against a subsequent equitable incumbrancer. On the contrary, having come to the conclusion that the Bank has not any lien upon *Wright's* [*137] shares, resulting from their partnership relation, I think the Plaintiffs' equitable title was perfected by the declaration of trust executed by the trustees of the settlement in July, 1830, without notice to the Bank, or any other person. The trust in favour of the Plaintiffs was perfected; and the Bank is in the situation of a person taking a subsequent equitable incumbrance on the property.

I was referred to the cases of *Duncan v. Chamberlayne* (a), and *Meux v. Bell* (b). The conclusion to which I have come renders it unnecessary that I should express any opinion upon the former case. I think it right only to say, that the point decided in *Duncan v. Chamberlayne* is not, in my judgment, in the least degree involved in the point I decided in *Meux v. Bell*.

Supposing the case to be free from the effect of any transaction with *Blount*, *Bunyan*, or *Muspratt*, the Plaintiffs are entitled to priority which they claim, to the extent of the 160 shares; and I shall make a declaration to that effect, that the parties, if they think fit, may appeal from my judgment, before prosecuting the inquiries which I shall direct. The claim of *Blount* raises a case between co-defendants, which must be made the subject of inquiry; and, until the result of that inquiry is known, I cannot venture to express any opinion whether the case of *Blount* may or may not come within the authority of those cases, where one party places property,—shares of this kind, for example,—into the name or in the apparent ownership of another, without creating any trust upon it. What the effect of the circumstances may be, on the question of order and disposition, I do not now enquire.

[*138] *Bunyan* disclaims in this suit; but if he had an interest in the 45 shares which he claimed, or if *Muspratt* had any beneficial interest, their former interests, though not at present existing, may possibly affect the identity of the shares. If *Wright*

(a) 11 Sim. 123.

(b) *Ante*, Vol. 1, p. 73.

1842.—Pinkett v. Wright.

had at any time transferred the whole of his interest in the shares to other persons, and afterwards taken back other shares, or rather shares which it would be impossible to say were the same, I could not, on the reasoning on which I have proceeded in this case, have come to the conclusion, that the 160 shares, which the decree (subject to any different result to which the enquiries may lead) will give to the Plaintiffs, were in fact the same shares on which their right attaches.

It was said at the bar, that 125 shares were transferred to *Muspratt*, for a nominal consideration, not conferring upon him any beneficial interest in them: if it were merely a loan of this nature, and afterwards re-transferred in pursuance of such an arrangement, it would not affect the case in point of identity. If, on the contrary, there was an actual sale of 125 shares to *Muspratt*, it may interpose a great difficulty in the way of the Plaintiffs' claim to 160 shares, for the sale would not have left a sufficient number to answer that claim.

The case was afterwards spoken to on minutes.

THIS Court doth declare that 160 original shares of 100*l.*, and 32 additional shares of 10*l.* each, in the Provincial Bank of *Ireland*, part of the shares in such Bank in the pleadings in this cause mentioned to be standing in the name of the Defendant, *J. Wright*, in the books of the said Banking Company at the time of his bankruptcy, were and are held by him upon the trusts of the settlement or deed in the pleadings mentioned, bearing date, &c. But the above declaration is to be without prejudice to the claim of the Defendant, *W. Blount*, *to [*139] 20 original shares of 100*l.* each, further part of the original shares of 100*l.* each, and 4 additional shares of 10*l.* each, further part of the said additional shares of 10*l.* each, standing in the name of the said *J. Wright*, in the books of the said Banking Company, at the time of his bankruptcy, and without prejudice to the claim, if any, which the said Provincial Bank of *Ireland*, and the assignees of the said *J. Wright*, may have in the shares standing in the name of the said *J. Wright*, at the time of his bankruptcy, by reason of any interest the Defendant, *R. J. Bunyan*, formerly had in 45 of the original shares of 100*l.* each, being the residue of the said original shares standing in the name of the said *J. Wright*, in the books of the said Banking Company, at the time of his bankruptcy, or by reason if the 125 original shares of 100*l.* each, alleged to have been transferred by the said *J. Wright* to *J. P. Muspratt*, on or about the 8th of August, 1836. And for the purpose of eas-

1842.—Pinkett v. Wright.

bling the Court to decide upon such claims, it is ordered, that it be referred to the Master, &c. [Inquiry of the number of shares in *Wright's* name at his bankruptcy and the dividend due thereon.] And it is ordered, &c., do inquire, &c., whether any and what shares in the said Provincial Bank of *Ireland*, standing in the name of the said *J. Wright*, at the time of his bankruptcy, in the books of the said Banking Company, were ever and when purchased or paid for by him, with monies in his hands, as the agent or trustee for or by the direction of the said Defendant, *W. Blount*, or as the agent or trustee for or by the direction of the said Defendant, *R. J. Bunyan*, or whether any and what of such shares were ever and when transferred or assigned by, or by the direction of the said Defendant, *R. J. Bunyan*, to the said *J. Wright* for any and what consideration, and upon or for any and what trust or purpose; and whether the said *J. Wright*, had any and what power or authority to sell and dispose of such last-mentioned shares or any of them. And, &c., do enquire, &c., whether the number of the original shares of 100*l.* each, in the said Provincial Bank of *Ireland*, standing in the name of the said *J. Wright*, in the books of the said Banking Company, were at any time between the 9th of July, 1830, and the bankruptcy of the said *J. Wright*, and independently of the transfer to the said *J. P. Muspratt*, hereinafter referred to, reduced to below the number of 225, and if so then it is ordered, &c., do inquire, &c., when and for what length of time, and under what circumstances, and by what means and to what extent the said original shares, standing in the name of the said *J. Wright*, were so reduced below the number of 225. And, &c., do inquire, &c., whether the 125 original shares of 100*l.* each, in the said Provincial Bank of *Ireland*, appearing from the first schedule to the answer of the Defendant *R. Murray*, to have been transferred by the said *J. Wright* to *J. P. Muspratt*, on or about the 8th of August, 1836, were so transferred; and if &c. the [*140] same were so transferred, then it is ordered, &c., do inquire what was the consideration for such transfer, and under what circumstances and for what purpose such transfer was made, and whether the said *J. P. Muspratt* ever and when retransferred the said 125 original shares of 100*l.* each, or any and how many of them to the said *J. Wright*, and for what consideration and under what circumstances. And, &c. [Inquiry as to the dividends declared between such transfer and re-transfer and to whom paid, and if to *Muspratt*, then whether paid over by *Muspratt* to *Wright*. Inquiry of dividends declared on shares standing in *Wright's* name before his bankruptcy, and to whom paid, and if to *Wright*, whether before his bankruptcy he paid or accounted for any and which dividends on the 160 original and 32 additional shares to the *cestui que trusts* of the settlement; and whether for any and what dividends on the 20 original and 4 additional shares to *Blount*, and whether for any and what dividends in the 45 original and 9 additional shares to *R. J. Bunyan*.] Appointment of new trustees of the settlement. Further directions and costs reserved. Liberty to apply.

Reg. Lib. B. 1824, fo. 256.

1842.—Campbell v. Thompson.

CAMPBELL v. THOMPSON.

1842: 21st Nov.

The mortgagee of a ship, by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry, within thirty days after the return of the ship to port, as required by the Registry Act,—the registered owner having after that time become bankrupt,—has no equity, distinct from his legal right to restrain the sale of the ship by the assignees; the title to the ship, after the bankruptcy, depending upon the application of the rule of law with regard to order and disposition.

BISHOP and *Kellie* were ship-owners and ship-agents in partnership. *Bishop* was the registered owner of $\frac{3}{4}$ of the ship, *Thomas Laurie*, of *London*, and being indebted to the Plaintiff, in a balance of account, *Bishop* executed to the Plaintiff a bill of sale of the ship, dated the 24th of November, 1840, purporting to be made in consideration of 2000*l.* paid by the Plaintiff. The bill of sale and the policy of insurance on the ship, which was then at sea, were delivered to the Plaintiff, accompanied by a letter in the following terms;—"We hereby deposit in your hands a bill of sale and policy of insurance for the ship *Thomas Laurie*, as collateral security for my debt to you, and hereby engage to indorse the policy to you at any time you may call on us to do so. For self and partner. *G. Bishop*." No further step "was taken ["141] to give effect to the security, until it was announced in the shipping lists, in November, 1841, that the ship, *Thomas Laurie*, had arrived in the English Channel. On the 8th of November, 1841, the bill of sale was produced at the Custom-house in *London*, and an entry thereof made in the book of registry of that port, as required by the Registry Act (a). The arrival of the ship was reported at the Custom-house on the 10th of November, 1841; the cargo was discharged in the St. Katherine Docks, and *Bishop* acted, in all respects as the owner, he received the certificate of registry from the master of the ship, and retained it in his possession.

(a) Stat. 3 & 4 Will. 4, c. 55, s. 34.

1842.—Campbell v. Thompson.

On the 15th of January, 1842, a fiat in bankruptcy issued against *Bishop*, under which he was declared bankrupt, and the Defendants were appointed his assignees.

After the bankruptcy of *Bishop*, a ship-keeper was put on board the *Thomas Laurie*, to take possession on behalf of the Plaintiff; and the Plaintiff also demanded the certificate of registry from *Bishop*, in order to procure the indorsement upon it of the particulars of the bill of sale, according to the act (a). *Bishop* said that the certificate had been given up to the official assignee. The official assignee was applied to, and refused to deliver it to the Plaintiff. The ship-keeper was afterwards withdrawn. The assignees caused the $\frac{1}{4}$ of the ship to be put up for sale.

The bill was filed, and a motion made, for an injunction to restrain the assignees from selling or transferring the ship, [*142] or from procuring or permitting the indorsement *on the certificate of registry of any such sale or transfer; or from parting with the certificate to any person except the Plaintiff, or from hindering the Plaintiff from procuring the said bill of sale to be indorsed thereon.

Mr. *Sharpe*, and Mr. *Campbell*, for the motion.

This application is distinguishable from the case of an attempt to give effect to an interest, the creation of which is against the policy of the Registry Acts, and therefore prohibited. It is only sought, by this motion, to protect the right, whatever it may be, which the Plaintiff now has. The transfer to the Plaintiff has not been indorsed on the certificate of registry; neither has a transfer to any other person been indorsed thereon. It is admitted, that the officers at the Custom-house do not make any entry in the registry, or on the certificate, of the bankruptcy and appointment of assignees; and the equitable title of the Plaintiff is, therefore, not prejudiced by the interposition of any legal title. The mere bankruptcy does not affect the case. The indorsement of the certificate to the Plaintiff may be effectually made by the bankrupt, after his bankruptcy. *Dixon v. Ewart* (b). The Plaintiff, by the bill of sale,

(a) Id. s. 36.

(b) 3 Mer. 322.

1842.—Campbell v. Thompson.

acquired a right against all persons whatsoever (a), from the date of the bill of sale, and entry in the book of registry, until thirty days after the return of the ship to (b); and after the thirty days, the Plaintiff has still a right against all persons whose interests are not indorsed on the certificate of registry, and have not, therefore, displaced his own (c). *Abbott on Shipping*, p. 66 (d); *Thompson v. Smith* (e); *Ex parte Stewart* (f). *The [*143] Plaintiff, therefore, has now a title which cannot be displaced, unless the assignees, by selling the share of the ship which remains registered in the bankrupt's name, and by causing an indorsement of the sale to be made on the certificate, should enable a purchaser from them to acquire a legal advantage. The Court will protect the Plaintiff, a purchaser for valuable consideration, from being prejudiced by such a proceeding. It is specially provided in the Registry Act, that notwithstanding a ship shall be in the order and disposition of a bankrupt, a mortgagee shall not thereby be defeated (g).

VICE-CHANCELLOR :—

The title of the Plaintiff depends on the fact of whether the share of the ship, the subject of the bill of sale, was in the order and disposition of the bankrupt at the time of his bankruptcy,—and on the legal consequence of that fact. I am not apprised of any circumstances upon which, if the rule with regard to order and disposition is applicable at law, the same rule must not equally be applicable in equity. I do not see, in this case, any equity to control the legal right. If the assignees have, at law, the right to sell the ship, I cannot restrain them. If they have not such right, their attempt to exercise it must be unavailing.

Motion refused.

(a) Stat. 3 & 4 Will. 4, c. 55, s. 35.

(c) Id. s. 35.

(e) 1 Madd. 395.

(g) Stat. 3 & 4 Will. 4, c. 55, ss. 42, 43.

(b) Id. s. 36.

(d) Ed. by Serj. Shee, 1840.

(f) 1 Gl. & Jam. 344.

1842.—Caldecott v. Brown.

Mr. *Russell*, and Mr. *Stevens*, for the Defendants, were not heard.

[144]

*CALDECOTT v. BROWN.

1842: 16th and 17th December.

A tenant for life cannot lay out monies in building or improvements on the estate, and charge them on the inheritance; and, therefore, the Court will not direct an inquiry what sums were expended by the tenant for life, in substantial improvements, beneficial to the inheritance.

B. BROGDEN devised and bequeathed his real and personal estate upon trust to permit his wife *Sarah* to receive and take the clear rents, issues, and profits of all and singular his said real and personal estate for her life, for her own sole use and benefit; and after the decease of his wife, the testator directed the said real and personal estate to be sold, and the proceeds of such sale to be divided amongst his children.

The testator died in 1799. *Sarah*, the widow, who was one of the devisees, and an executrix, proved the will, and entered into possession of her life estate. The widow died in 1840. The bill was filed in 1841, for the administration of the estate of the testator, by the parties entitled in remainder, against the representatives of the widow, his executrix.

The representatives of the widow, by their answer, alleged, that the personal estate had been exhausted by the charges upon it, and that the widow had expended out of her own monies, during the continuance of her life estate, the sum of 2000*l.*, and upwards, in substantial and lasting improvements of the said hereditaments and premises and the inheritance thereof, and they claimed to be allowed the same in taking the account of the estate of the testator, as monies expended by the tenant for life and executrix. The Defendants, by evidence in the cause, proved that 2000*l.* and upwards had been expended by the executrix in building on the property. At the hearing of the cause—

 1842.—Caldecott v. Brown.

Mr. *Blunt*, for the Defendants, asked for a reference "to inquire whether any and what sums had been laid [*145] out by the tenant for life in permanent improvements of the premises, beneficial to the inheritance, or such other inquiry to that effect, as would bring before the Court the advantage which the Plaintiffs, the parties entitled in remainder, derived from the expenditures made by the tenant for life. *Hibbert v. Cooke*(a); *Graves v. Graves*(b).

Mr. *Nollett*, for the Plaintiffs, opposed the application for the reference.

VICE-CHANCELLOR :—

I am of opinion that I ought not to make the order for the reference which the Defendants seek in this case. I was referred to the case of *Hibbert v. Cooke* as an authority for the inquiry ; but in that case Sir *John Leach* refused to direct an inquiry of the expenses incurred by the tenant for life in repairs to the mansion-house, which had been rendered necessary owing to the dry rot, although the inquiry was not opposed. If the mansion house was affected by the dry rot, it would certainly be a substantial improvement to remove it ; but the Court in *Hibbert v. Cooke* said, that it was an expense to which a tenant for life, choosing to occupy the property, must submit. I do not know how to consider that case otherwise than as overruling *Graves v. Graves*.

I do not mean to lay it down as an imperative rule, that no case could arise in which the Court would sanction the expenditure of monies by a tenant for life for the benefit of the inheritance, by making such expenditure a charge upon the [*146] inheritance. The case may be suggested, of a devise of lands in strict settlement, and a direction to lay out personal estate to the same uses : it might be more beneficial to the remaindermen that a part of the trust fund should be applied to prevent build-

(a) 1 Sim. & St. 552.

(b) M. R., March, 1822, cited 1 Sim. & St. 553.

 1843.—*Shuttleworth v. Shuttleworth*.

ings on the settled estate from going to destruction, than that the whole should be laid out in the purchase of other lands. Other like cases might perhaps be supposed.

In *Bostock v. Blakeney*(a), Mr. Justice *Buller*, sitting for the Lord Chancellor, directed, at the hearing of the cause, an inquiry what substantial and lasting improvements had been made by the tenant for life of the estate; but the decree was reheard by the Lord Chancellor, and reversed on this point; and in the case of *Nairn v. Majoribanks*(b), the Court was asked to direct a reference whether it would be for the benefit of the parties interested in the property, that a new roof to the mansion-house should be constructed at the expense of the testator's estate; but Lord *Eldon* refused to make any order upon the petition, observing, that he would not confirm the report, even if the Master should find that it would be beneficial to all the parties.

I do not think that the alleged fact of the insufficiency of the personal estate of the testator in this case affects the question.

 [*147]

*SHUTTLEWORTH v. SHUTTLEWORTH.

1843: 11th January.

Testamentary guardian of an infant trustee, who was residing out of the jurisdiction appointed guardian ad litem, without either the appearance of the infant in Court or a commission.

Mr. *Romilly* moved, that the testamentary guardian of an infant Defendant, who was the heir of the last survivor of several trustees, and had no beneficial interest in the subject of the suit, might be appointed his guardian, ad litem, without the appearance of the infant in Court, and without a commission. The infant was residing in *Scotland*. *Smith v. Palmer* (c).

(a) 2 Bro. C. C. 656.

(b) 3 Russ. 582.

(c) 3 Beav. 10.

1843.—Colman v. Northcote.

THE VICE-CHANCELLOR, upon affidavits of the facts above stated, made the order.

COLMAN v. NORTHCOTE.

1843: 31st January. 2d March.

The answer of a married woman, who is an infant, cannot be taken either separately or jointly with her husband, until she has had a guardian assigned.[1]

THE clerk of records and writs refused to file the joint answer of *Augustus Northcote*, and *Emma* his wife, the wife being an infant, and yet having no guardian (a).

*Mr. *Randell* moved that the answer might be taken [*148] without a guardian.

THE VICE-CHANCELLOR said that the practice had been, to require the appointment of a guardian to an infant Defendant, notwithstanding she was a married woman (b): the *Vice-Chancellor of England* had followed that practice in cases before him.

Motion refused.

(a) I hereby certify, that I refused to file the answer of the above-named Defendants, because the Defendant, *Emma Northcote*, is, by the said answer, stated to be an infant, and no order or return to a commission assigning a guardian for the said Defendant, *Emma Northcote*, was produced to me,

Dated this 16th day of February, 1843.

Fred. Bedwell.

(b) The following cases were produced:—

1706. 11th June. Sir *John Trevor*, M.R.—*Com. Jersey v. Villiers*. Lord *Villiers* was assigned the guardian of his wife, Lady *Villiers*, an infant. Reg. Lib. A. 1705, p. 421.

Kemys v. Kemys, 1752. 19th March, M. R.—Upon the petition of the defendant *John Lewis*, and *Mary* his wife, the defendant *John Lewis* was assigned the guardian of

[1] On a bill for a divorce, if the wife is an infant, she must prosecute a defendant by her next friend or guardian. *Wood v. Wood*, 2 Paige R. 108. If the defendant in a suit by the husband to annul a marriage on the ground of fraud, is an idiot, the complainant must procure a guardian ad litem to appear and defend the suit for the wife. *Montgomery v. Montgomery*, 8 Barb. Ch. R. 132.

 1843.—Robinson v. Stanford.

[149]

ROBINSON v. STANFORD.

1843: 27th Feb. 1st March.

A defendant in contempt for not answering the bill,—brought to the bar and remanded,—and again brought up by habeas corpus, twenty-eight days after having been remanded, upon motion to take the bill pro confesso, under the stat. 1 Will. 4. c. 36, s. 15, rule 2, may file his answer after the motion is made; and, *semble*, at the latest time on that day.

Lord Clarendon's General Order, that, after a contempt duly prosecuted to an attachment with proclamations returned, no plea or demurrer shall be admitted but upon motion in Court, does not apply to the process at present substituted for attachment with proclamations. *Semble*.

THE twenty-eight days prescribed in the act 1 Will. 4, c. 36, rule 2, having expired, and the Defendant being brought to the bar,

Mr. *Chandless*, for the Plaintiff, moved that the bill might be taken pro confesso.

Mr. *My Christie*, for the prisoner, said that his plea and answer to the bill were drawn and signed by counsel, and were in the act of being filed.

Mr. *Chandless* argued, that the Plaintiff was peremptorily entitled to the order for taking the bill pro confesso, the answer not being on the file when the motion was made. *James v. Cresswicke* (a). And in this stage of the cause, the Defendant being in con-

the defendant, *Mary*, the infant, his wife, by whom she might answer and defend the suit. Reg. Lib. A. 1751, fo. 306.

Tyrel v. Schomberg, 1764. Upon the petition of the defendant, *A. Schomberg* and *Mary* his wife, this day &c., for the reasons therein contained, and the plaintiff's clerk in court having signed his consent to the prayer thereof,—it is ordered that the petitioners be at liberty to take their answer put in by them to the plaintiff's bill off the file, and amend and retake the same by virtue of a commission to be issued &c. Reg. Lib. B. 1763, fo. 155. The defendant, *A. Schomberg*, was assigned the guardian of the defendant *Mary Susanna Arabella*, his wife, by whom she might answer plaintiff's bill, and defend this suit; and it was ordered that a commission do issue to take the answer of the defendant *A. Schomberg*, and also the answer of the defendant *Mary Susanna Arabella* his wife, by the said *A. Schomberg* her guardian, &c. Reg. Lib. B. 1763, fo. 155.

(a) 7 Sim. 143.

 1843.—Robinson v. Stanford.

tempt, even if he might answer, would be prevented by Lord *Clarendon's* Order (a), from filing a plea or demurrer, without the previous leave of the Court. *Sanders v. Murney* (b).

Before the rising of the Court, and before judgment had been given upon the motion, the Defendant produced the certificate of the filing of the plea and answer.

THE VICE-CHANCELLOR held, that the plea and answer of the Defendant having been filed on the day that the motion to take the bill pro confesso was made, the Court "would [*150] not order the bill to be taken pro confesso. The statute 1 Will. 4, c. 36, s. 15, r. 2, referred the Court, in terms, to the old practice:—"The Court shall order the bill to be taken pro confesso against such defendant in the same manner as is now usual in the like cases upon the return of a writ of alias pluries habeas corpus." The books of practice (c), and all the authorities or the point shewed that the Court allowed the most extreme indulgence to defendants in such cases (d); and form of the order for taking the bill pro confesso was also conclusive to shew, that the Defendant was allowed, even at the latest moment, to file his answer (e). The

(a) Beames's Ord. 178, (1661, Id. 165).

(b) 1 Sim. & St. 225.

(c) See 1 Dan. Ch. Pr. 693; Pract. Reg. 352, 353, Wyatt's ed.

(d) See also *Herne v. Ogilvie*, 11 Ves. 77.

(e) Whereas the Plaintiff on the, &c., exhibited his bill in this Court against the defendant, setting forth as therein set forth; and the said defendant, being served with process of subpoena, appeared to the said bill, but refusing to put in his answer an attachment, &c., [reciting the subsequent process]; that by an order &c., it was ordered that a habeas corpus cum causis should issue, directed to the Warden of the Fleet, at the return thereof, to bring the said defendant to the bar of this Court to answer his said contempt, whereupon such further order should be made as should be just, and the clerk in court for the plaintiff was then to attend with the record of the plaintiff's bill, in order that the same might be taken pro confesso; and the said defendant being this day brought up to the bar of this Court accordingly, and the record of the plaintiff's bill being now read, and the defendant *still persisting in his said contempt, and refusing to put in his answer* and the counsel for the plaintiff praying that the plaintiff's bill may be taken pro confesso, this Court doth order, &c. [Decree].

 1843.—*Roberts v. Williams.*

other point, whether a plea might be filed by a defendant in contempt, in this stage of the proceedings, depended upon the question whether the Court was to make a new practice, and adopt the spirit of Lord *Clarendon's* order, in a case not within its terms,—the process by attachment with proclamations being now abolished (a).

[*151] The Plaintiff might, if he were so advised, move to take the plea and answer off the file; but for the present purpose, it must be treated as a form of pleading not irregular.

No motion was made to take the plea and answer off the file. The plea came on for argument, and was overruled.

ROBERTS v. WILLIAMS.

1843: 13th, and 17th February.

The Plaintiff obtaining the order nisi to confirm the Master's report, but not proceeding to make the order absolute, the Defendant may move to confirm the report, and for that purpose the certificate of no cause shewn will be ordered to be entered on his office copy of the order nisi.

THE Plaintiff obtained the order nisi to confirm the Master's report, and served it; but allowed the eight days to expire without confirming absolutely. The Defendant now moved *ex parte* that the registrar might enter in the margin of the Defendant's office copy of the order nisi, the certificate of no cause shown, and that the report might be confirmed absolute.

THE VICE-CHANCELLOR suggested, that one course of proceeding might be, to direct the confirmation of the report, unless the Plaintiff, having notice of the order, should, on or before the expiration of eight days, himself obtain an order to confirm; but on the

(a) Order VI. of August, 1841; Beav. Ord. Can. 64.

1848.—*Prentice v. Phillips.*

authority of *Chillingworth v. Chillingworth* (a), made the order as asked.

Mr. *Renshaw*, for the motion.

*PRENTICE v. PHILLIPS.

[152]

1848: 2nd and 3rd March.

Documents directed to be deposited with the clerk of records and writs, after an order allowing the Plaintiff or his solicitors to inspect and take copies thereof at the office of the Defendant's solicitors,—the solicitors not agreeing by whom the copies were to be made.

ON motion by the Plaintiff for the production of documents, it was ordered, that the Defendants should, within seven days after service thereof, produce and leave with Messrs. *B. & C.*, of &c., the solicitors or agents of the said Defendants, the several letters, papers, and writings, admitted by the answer of the said Defendants, and the schedule thereto, to be in their possession or power; and it was ordered, that the Plaintiff, his solicitors or agents, should have liberty, at all seasonable times, and on giving reasonable notice thereof, to inspect and take copies of the same, or of such parts thereof as he may be advised, at his own expense.

Messrs. *B. & C.*, the Defendants' solicitors, offered to furnish the Plaintiff's solicitors, at the Plaintiff's expense, with copies of any of the documents left with them for inspection under the order; but declined to allow the Plaintiff's solicitors to make copies themselves.

Mr. *Biggs*, for the Plaintiff, moved that the Defendants, and Messrs. *B. & C.*, the solicitors or agents of the said Defendants, might be directed, within two days after the service upon them of any order to be made on the motion, to permit the Plaintiff, his solicitor or agent, to make copies for themselves of the several letters,

(b) 1 Sim. 201.

1843.—Prentice v. Phillips.

papers, and writings, directed to be produced and left with the said Messrs. *B. & C.*, the solicitors or agents of the Defendants, by the foregoing order; or that the Defendants, and the said Messrs. *B. & C.*, might be directed forthwith to leave the said several letters, papers, and writings, with the proper officer of the Court, [*158] for the *purposes of the foregoing order; and that the Defendants, and Messrs. *B. & C.*, might be directed to pay the costs of this motion.

Mr. *Baily*, for the Defendants, and Messrs. *B. & C.*, submitted, that they had complied with the order which allowed the Plaintiff or his solicitors to inspect and take (not make) copies of the documents; and that it would be an unreasonable construction of the order to suppose that it gave the Plaintiff's solicitor, or his clerks, the occupation of the office of the Defendants' solicitors, so long as it might be necessary to make copies of voluminous documents. The Defendants' solicitors had allowed their office to be the place of deposit for the sake of convenience, but would not allow it on the construction which the motion supposed.

Mr. *Briggs* said, that the production at the solicitors' office was an indulgence to the Defendants; as the strict practice was, that the documents should be deposited with the officer of the Court. If the Plaintiff's solicitor were not allowed to make the copies, the documents must be brought into Court in the usual manner.

THE VICE-CHANCELLOR ordered the documents to be deposited with the clerk of records and writs, for the usual purposes. The question, by whom copies should be made under the common order allowing the Plaintiff or his agents to take copies of documents deposited, had been, in practice, a subject of dispute, during the time that the deposit was made with the clerks in court; and, therefore, he made no order as to costs. He had, in many cases, followed the principle pointed out by the case of *Grane v. Cooper* (a); and

(a) 4 Myl. & Cr. 263.

 1843.—*Shewell v. Shewell*.

frequently, upon the suggestion of the Defendant, [*154] that such course would be most convenient, made orders for the production of documents at the Defendant's or his solicitors' place of business; but this motion shewed, that so much difficulty might arise from making the order in that form, as to render it generally the better rule, that the order should be in the common form, namely, for the production of the documents at the office of the Court; in which case, any variation for the convenience of the parties might be made a matter of arrangement between them.

SHEWELL v. SHEWELL.

1843: 12th and 14th January.

Order for payment of the dividends of a fund in Court, to the executors, for distribution amongst the parties interested, before the accounts of the estates were taken, the executors admitting assets of the testator for all purposes.

AN administration suit. The accounts had not been taken, but a sum of 175,000*l.* Consols. had been transferred to the credit of the cause. Various persons were entitled to interests for life or other present interests charged on the income of the residue. The executors were willing to receive the dividends and pay them over to the different parties having immediate interests therein.

Mr. Romilly moved, that,—all parties consenting,—the dividends to accrue due on the fund in Court might be ordered to be paid to the executors; *Dando v. Dando* (a).

THE VICE-CHANCELLOR said, the practice of the Court was not to order the payment of any part of the fund, unless the accounts were taken, or assets for all purposes admitted by the executors; and, in the latter case, the Court should be satisfied of the propriety of the proposed application of the [*155]

(a) 1 Sim. 510.

1842.—*Brooks v. Jobling.*

fund, or it might by its order deprive the parties interested of the security of the fund itself, and, for that security, substitute the personal liability of the executors.

Upon the application of the parties beneficially interested, the trustees and executors consenting, and admitting assets of the testator for all purposes, the order was made.

BROOKS v. JOBLING.

1843: 17th, 18th, and 30th March.

The order appointing a solicitor to be the guardian ad litem of a lunatic, not found so by commission, may be made under the 28th Order of October, 1842, on the application of the Plaintiff; but it cannot be made without service of notice upon the alleged lunatic.

MOTION on behalf of the Plaintiff, under the Order XXVIII. of the 26th of October, 1842, that a guardian ad litem may be appointed of *Thomas Jobling*, one of the Defendants in the cause, a person of unsound mind.

The affidavits read were,—that of the proprietor of the asylum under whose care the Defendant was placed, stating that he had been received on the certificate of two surgeons, and that the deponent believed him to be of unsound mind, and incapable of taking care of his own affairs, or of acting in the management of his defence in the suit, and no commission of lunacy had issued;—and that of the Plaintiff's solicitor, who deposed to applications to the solicitor of the wife of the lunatic, and to several of his nearest relations, who refused to interfere in his defence.

[THE VICE-CHANCELLOR doubted whether—the case
[156] not being one in which any attachment had issued
against the defendant,—the order could properly be
made on the application of the Plaintiff; and whether, as in the case

 1842.—Penfold v. Bouch.

of an infant, the motion ought not to have been on behalf of the Defendant. And his Honor said, that even if the order could be made on the application of the Plaintiff, it could only be done upon proof of service upon the Defendant of the subpoena to appear, and of notice of the motion.]

Mr. *Rogers*, for the motion, cited *Howlett v. Wilbraham* (a); and 1 *Daniell*, Ch. Pr. p. 220. Cases, in which the order assigning a guardian had been made on the Plaintiff's application, were produced from the registrar's book (b).

Upon the authorities in the registrar's book and upon affidavit of the service upon the Defendant, *Thomas Jobling*, of the subpoena to appear, and of the notice that the Court would be moved this day, to appoint one of the solicitors of this Court to act as guardian to the said *Thomas Jobling*, a person of unsound mind, by whom he might appear to and answer the bill, and who might defend the suit in his behalf,—

Mr. *Rogers* suggesting the name of a solicitor who was willing to take the duty,

THE VICE-CHANCELLOR appointed such solicitor to be the guardian.

 *PENFOLD v. BOUCH.

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1843: 30th March.

Verification of the copy of the bill to be served under the 24th Order of August, 1841.

MR. BICHNER moved to enter the memorandum of service, under

(a) 5 Madd. 428.

(b) *Miller v. Smiles*, Reg. Lib. B. 1828, fo. 1759; *Macdonald v. Macdonald*, Reg. Lib. B. 1834, fo. 998.

 1843.—Ballard v. White.

the Order XXIV. of August, 1841, of copies of the bill examined from the draft(*a*) of the bill(*b*), which was proved to correspond with the ingrossment.

THE VICE-CHANCELLOR made the order, observing, that it ought in all cases to appear by the affidavit in what way the truth of the copy served had been ascertained(*c*).

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*BALLARD v. WHITE.

1843: 27th and 31st March.

Exceptions to the Master's report ought to follow in form as well as in substance the objections carried in before the Master.

Upwards of thirty separate objections were taken to the draft report, in respect of the same number of items allowed in an account; one exception, including all the objections, was taken to the report, for that the Master ought to have disallowed the same items, or some or one of them:—*Held*, that this was informal, for the exceptant requiring the judgment of the Court on every item, the exceptions should have been in the same form as the objections, and thereby have called for such judgment; that this exception must be allowed, if it should be found that any item ought to have been disallowed; but that, notwithstanding the informality, the Court might, if it thought fit, hear the exception upon all the items, and make a special declaration as to any or all which had been improperly allowed.

An infant Plaintiff coming of age during the progress of the cause, and disapproving of the proceedings, cannot appear in the proceedings by counsel, other than those who appear for the Plaintiffs generally: he can only complain of or repudiate the proceedings by making them the subject of a special application.

(*a*) See *Blew v. Martin*, ante, Vol. 1. p. 151, n.

(*b*) By the affidavit read, the deponent stated "that he examined each copy which he so served as aforesaid, with the draft from which the ingrossment of the said bill was made, and that deponent examined the said ingrossment with the said draft, and filed the same at the record and writ clerk's office, and that no alteration was made in the said draft, from the time when he so examined and filed the said ingrossment, to the time he so examined the said copies as aforesaid, nor was the said draft out of the deponent's custody between the time of such respective examinations."

See on this Order, *Welch v. Welch*, Vol. 1, p. 593.

(*c*) The order had been sometimes made on the simple averment in the affidavit, that the copies served were "true copies" of the bill, without shewing how they were proved to be so.

1843.—*Ballard v. White*.

UNDER a decree to take the accounts of an estate, in a suit against the administrator, the Master allowed the Defendant various sums in his discharge, and among them allowed upwards of thirty different items, varying in amount from 5s. to 80l., to which the Plaintiffs objected; and as to which they carried in distinct objections to the draft report for every item complained of. The Master overruled the objections.

Two exceptions were taken by the Plaintiffs to the report:—First exception, for that the Master had found that the Defendant had laid out and expended several sums of money amounting together to 467l. 14s. 6d., in the funeral of the intestate, in obtaining letters of administration to his estate, in discharge of debts due from him at the time of his decease, and otherwise on account of his personal estate, the particulars whereof the Master had set forth in the schedule to his report; whereas he ought to have found that the monies so laid out and expended amounted to a less sum than 467l. 14s. 6d.:—Second exception, “for that the Master has in and by his report, and the second schedule thereto, allowed to the Defendant the several sums of money specified in the schedule hereto annexed;—whereas he ought to have disallowed the same sums of money or some or one of them, or some part or parts of them, or some or one of them.”

“*Mr. Roupell*, in support of the exceptions.

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Mr. Watson appeared for two of the three Plaintiffs, and stated that they were infants at the time of the institution of the suit, and had since come of age, and repudiated the present proceedings, by exception.

Mr. Roupell cited *Acres v. Little(a)*, and insisted that the parties, in order to interpose, ought to have moved that their names should be struck out of the record as Plaintiffs.

THE VICE-CHANCELLOR said, that the Plaintiffs could not sever,

(a) 7 Sim. 138.

 1843.—*Ballard v. White*.

but must be heard by the same counsel. There was nothing to shew that the proceedings had not been or were not regular, and if any objections to the proceedings were to be taken, or the frame of the suit was proposed to be altered, it must be upon an application to the Court for that specific purpose.

Mr. *Goodeve*, for the Defendant, objected to the form of the exceptions, as being necessarily inconclusive, inasmuch as any decision to which the Court might come, except that of overruling both exceptions, would still leave the case wholly undecided. The exceptions should have followed the form of the objections, every item being made to form a distinct subject of exception. The first exception, moreover, was so framed, that even if it was overruled, the case must be again opened in order to proceed with the consideration of the second exception; 2 *Smith, Pr.* p. 341, 342; 2 *Dan. Ch. Pr.* 957.

[*160] *Mr. *Roupell*, and Mr. *G. L. Russell*, for the exceptions, insisted that they were correct in form; and that, to make every item the subject of a separate exception, would justly have been complained of as oppressive. *Gompertz v. Best(a)*. The court might as conveniently dispose of the whole case by considering the items in the schedule successively, and making a special order, as if there were distinct exceptions.

Moore v. Langford(b), and *Tench v. Cheese(c)*, were also cited.

VICE-CHANCELLOR:—

The Plaintiffs, in this case, carried in objections to the allowances made by the Master to the Defendant: these objections were upwards of thirty in number, and were overruled by the Master. The general, I may say nearly the invariable, practice, where the draft of the Master's report has been objected to is, to convert the objections into exceptions. The rule, which is stated in all the books of practice, is, that the party who excepts to the report, is bound to make his exceptions correspond with his objections, so that, at least,

(a) 1 You. & Coll. 114.

(b) 6 Sim. 323.

(c) 1 Beav. 571.

 1843.—Ballard v. White.

they may be the same in substance. I doubted, and still, to some extent, doubt, whether these exceptions are, in substance, the same as the objections. In form, they clearly are not so. The objections being separate, the Master was required and obliged by the form of the objections to come to a distinct conclusion with respect to every item: he could not avoid doing so. The manner in which the question is brought before the Court, by these exceptions is materially different. All that the exceptions require me to decide is, that something has been "improperly allowed. As [*161] soon as the excepting party has proved that one item, or part of an item, is wrong, he has proved the truth of his exception; and the case might then regularly go back to the Master.

The first question, then, I have to consider is, whether this exception is so informal that I cannot entertain it at all. It may be an exception which I am bound to entertain; and yet be so framed that I cannot dispose of the whole case. If an exception is so informal, that the Court cannot deal with it, I think the party, who takes that objection, should have applied to take the exception off the file. By leaving it on the file, and permitting it to come on for argument, he admits, that it is not so vicious in form but that it may be dealt with, at least, for the purpose of being overruled. Supposing, therefore, that in substance it cannot be supported, I must yet treat it as being an exception which I am bound to entertain for some purpose; and I think that I am bound to entertain it for the purpose of seeing whether there is, or not, something wrong in the Master's report.

Having determined, then, that I am to inquire whether there is or not some error in the report; and there being no doubt that if I find any thing wrong, I am at liberty immediately to allow the exception, and send the case back to the Master, the next question is, whether I am bound so to do without pronouncing a judgment upon every item in the schedule to the exceptions, the consequence being that the case might be sent from the Court to the Master, and the Master to the Court, as many times as there are items objected to?

The inconvenience I have suggested may be obviated by taking this course:—the Court on the discussion of the exceptions

 1842.—*Neesom v. Clarkson.*

[*162] may go through the whole of the items, * (although the form of the exceptions does not require that it should do so), and may make a declaration on every item it may disallow, and send the case back to the Master to review his report, having regard to those declarations. I am quite clear that I may take this course (a); and it meets the justice of the case: it is equally clear, that the party who opposes the exceptions cannot be injured by it, even to the extent of being surprised; because, from the objections that were carried in, he knows precisely what the questions are which he has now to meet. The only reluctance I have felt to take this course, arises from the apprehension, that, by endeavouring in this case to do what is abstractedly just, I may encourage other attempts to create new forms of exceptions,—for this certainly is a new mode of excepting, and a departure from the common form of practice. As I must, however, for some purpose deal with these exceptions, I think it is better, and less inconvenient, that I should go into the whole case, than put the parties to the useless expense of converting the objections into exceptions. I shall hear the exceptions fully, and declare my opinion as to each item, (if any), on which I may differ from the Master, and send the case back to the Master with those declarations: that is the justice of the case, and there is nothing in practice which strictly prohibits my doing it. In point of expense it is plain that this form of exception comes nearly to the same thing as if the usual form had been adopted; and which form I hope will be adhered to in future cases.

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*NEESOM v. CLARKSON.

1842: 12th and 14th November and 10th December.

A. contracted to purchase real estate, and died having made his widow his universal devisee and legatee. The widow married B., who, in 1798, took a conveyance of

(a) See Vol. I., p. 578.

 1842.—*Neesom v. Clarkson.*

the premises contracted to be purchased by A. to himself and a trustee, reciting the contract by A.,—his will and death,—the marriage of his widow with B.; and that “thereupon B. became entitled to the beneficial interest in the purchase.” B., in 1617, sold the premises to C., and C. took a conveyance from B. and his trustee, reciting, that by certain good and sufficient assurances in the law, the premises stood limited to B. and the trustee, but not reciting the deed of 1793. The widow died leaving her heir-at-law an infant, who came of age in 1825, in the life-time of B. The bill was brought by the heir-at-law in 1836, after the death of B., for a conveyance of the estate.

Held, that the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, and that the title of B. accrued by the marriage; that the Court would not presume, in favour of a purchaser, that B. had any other title than was so represented; that C. must be presumed to have been cognizant of and to have taken the title of B. his vendor; that the equitable title of the heir-at-law of the widow was not affected by the lapse of time; and that the heir-at-law was entitled to the decree for a conveyance of the estate.

JOHN COWLING, in 1792, purchased, at a sale by auction, certain freehold premises at Leeds, known as the *Angel Inn*, for the sum of 1500*l.*, but before any conveyance of the estate was executed, or the purchase money paid, *Cowling* died, having by his will, made in January, 1793, devised all his real estate to *Ann*, his widow, and made her his residuary legatee and executrix. *Ann* the widow proved the will. In July, 1793, *Ann* the widow married *William Sykes*.

By indentures of lease and release, dated the 24th and 25th of September, 1793, the latter made between *Wade Brown* (the vendor of the premises), devisee in trust thereof, appointed by the will of *Alice Bywater*, deceased, of the first part; and said *William Sykes* and *Ann* his wife (who was the widow and relict of the said *John Cowling*, deceased), of the second part; and *L. Nicholson*, of the third part; reciting the will of *Alice Bywater*, and reciting that the said *Wade Brown*, in pursuance of the trust in him reposed by said will, caused the tenements and hereditaments thereinafter mentioned, (being all the residue of the real estate of the said *Alice Bywater*), to be advertised in the public newspapers “for [164] sale by auction on the 3rd day of October, 1792, on which day a meeting was held; and the said *John Cowling*, being the highest bidder at such sale, became the purchaser of the said

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tenements and hereditaments, at or for the price or sum of 1500*l.*, being the best price that could be had or gotten for the same; and reciting, that the said *John Cowling* had since departed this life, having first made and duly executed his last will and testament and thereof appointed the said *Ann Sykes*, his then wife, universal devisee and legatee, and sole executrix; and reciting, that the said *William Sykes* had, since the death of the said *John Cowling*, intermarried with the said *Ann* his widow, and thereupon became entitled to the beneficial interest in the said purchase, and had agreed to complete the same, but not being provided with the whole of the purchase-money, the said *Wade Brown* had agreed to let the sum of 1100*l.* part thereof remain in the hands of the said *William Sykes*, upon security of the said tenements and hereditaments, in manner hereinafter mentioned and expressed,—the said premises called the *Angel Inn* were conveyed and assured to *L. Nicholson*, and his heirs, as to a term of 1000 years, to the use of the said *Wade Brown*, for securing payment of the said 1100*l.* and interest thereon; and as to the remainder, to the use of the said *William Sykes* and *L. Nicholson*, and their heirs, in trust, nevertheless, as to the estate of the said *L. Nicholson*, and his heirs, for the said *William Sykes*, his heirs and assigns.

By an indenture of demise and mortgage of the 5th of September, 1800, made between the said *William Sykes* of the first part; *Nicholson* of the second part; and *Wade Browne* of the third part, *William Sykes* and *Nicholson* demised the premises to *Wade Browne*, his executors, &c, for the term of 1000 years,
 [*165] subject to a proviso for redemption of the said premises on payment of 500*l.*, with interest as therein mentioned.

In pursuance of a contract for the sale of the premises by *William Sykes* to *Benjamin Clarkson*, an indenture, dated the 30th of September, 1817, was made between the said *William Sykes* of the first part; *L. Nicholson* of the second part; *Wade Browne* of the third part; *Benjamin Clarkson* of the fourth part, and *T. Hampshire* (a trustee for *Clarkson*) of the fifth part; reciting that, under and by virtue of certain good and sufficient conveyances and assurances in the law, the said premises then stood limited and assured

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to the use of the said *William Sykes* and *L. Nicholson*, and their heirs, nevertheless as to the estate and interest of the said *L. Nicholson* and his heirs therein, in trust for the said *William Sykes*, his heirs and assigns for ever, subject only to the mortgage next thereafter mentioned; and reciting the said demise by way of mortgage of the 5th September, 1800, that the estate of the said *Wade Brown* thereunder had become absolute at law, and that the sum of 150*l.* only remained due on the said mortgage; and reciting that *Benjamin Clarkson* had, sometime previously, contracted and agreed with *William Sykes* for the absolute purchase of an estate of inheritance in fee simple, in possession, free from all incumbrances of and in the said premises, at or for the price or sum of 2700*l.*, out of which it had been agreed that the said sum of 150*l.*, so due and owing to the said *Wade Brown*, should in the first place be paid; and reciting that the said *William Sykes* had applied to, and prevailed upon, the said *L. Nicholson* and *Wade Brown* to join in conveying and assuring the said hereditaments to the said *Benjamin Clarkson* and his heirs, to the uses and in manner thereafter mentioned; and the said premises and the said term therein, were thereby conveyed and assigned to *Benjamin Clarkson* and his heirs in fee. *Clarkson* afterwards died, having devised [*166] the premises to the Defendants.

Ann Sykes (formerly the widow of *Cowling*) died on the 9th of September, 1821, leaving the Plaintiff, her daughter by a former husband, her heiress-at-law, then an infant. The Plaintiff attained twenty-one years of age in August, 1825, and intermarried with *Neesom*, the other Plaintiff, in January, 1826. *William Sykes* died in August, 1835.

In August, 1836, the bill was filed against the devisees of *Clarkson*, praying that they might be decreed to convey the premises to the Plaintiff, and to account for the rents and profits, the Plaintiff offering to pay what might be due to the Defendants in respect of the purchase-money.

The answer stated, that *Cowling*, as the Defendants believed, never entered into any written or binding contract for the purchase of the premises; that at his death his property was sworn to be un-

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der the value of 40*l.*, and that he was in fact insolvent; that *Sykes* entered into an independent contract for the purchase, and to complete the same borrowed 1100*l.* from *Wade Brown*, and paid the residue out of his own monies. The answer stated the indentures of the 24th and 25th of November, 1793, and that the premises were thereby conveyed and assured in the manner above stated (a). The answer of the Defendants said they [*167] did not believe that any interest in the premises passed by the will of *Cowling* to *Ann Sykes*, or that *Ann Sykes* had ever interest in them; and they insisted that they were purchasers for any valuable consideration, without notice of any such interest, and as such had been in undisturbed possession since 1817.

Mr. *Wakefield*, Mr. *C. P. Cooper*, Mr. *Kenyon Parker*, and Mr. *Hodgson*, for the Plaintiff.

The contract made by *Cowling*, for the purchase of the premises in question, being made at a sale by auction, must, at this distance of time, be presumed, without evidence of any written contract, to have been made in a manner which was binding within the Statute of Frauds. The auctioneer, for that purpose, is the agent of both parties. *Emmerson v. Heelis* (b); *White v. Proctor* (c); 1 *Sugd. Vend.* 4

(a) The Defendants admitted the possession of the indentures of the 24th and 25th of November, 1793. The Plaintiffs moved, upon the answer, for their production. The *Vice-Chancellor of England* refused the motion. The motion was afterwards made before the *Lord Chancellor*.

Mr. *C. P. Cooper*, for the Plaintiffs.

Mr. *Wakefield*, for the Defendants.

Kennedy v. Green (a) and other authorities were mentioned. The statement in the recital was relied on as shewing that the purchaser had constructive notice of the Plaintiffs' title.

The *Lord Chancellor* ordered the deeds to be produced (c).

(b) 2 Taunt. 38.

(c) 4 Id. 209.

(a) 6 Sim. 6.

(b) See the report of this case, upon the motion, in Mr. *C. P. Cooper's* *Select Cases*, p. 93.

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Pur. p. 188, 10th ed. The effect of the contract was, therefore, to vest in *Cowling* the equitable interest in the premises. His widow took the same interest as his devisee. Supposing that the widow had then died intestate,—the Plaintiff would have taken the premises as heiress-at-law, either subject to the payment of the purchase-money in the nature of a mortgage, or with the right of having the purchase-money raised and paid out of the personal estate. The equitable interest, however, remained vested in the widow at the time her marriage with *Sykes*. Nothing has since [*168] taken place to divest the widow and her heirs of that interest: it could not pass without fine, the widow having died in the lifetime of *Sykes*. The defendants are bound by the recitals in the deed of 1793, and they do not in fact, by their answer, suggest that they derive their title in any other manner. *Gilbert on Evidence*, p. 86; *Fort v. Clarke* (a). There was no reason for making *Nicholson* a party to the deed of 1817, except in respect of his interest as a trustee for *Sykes* and that interest he acquired only by means of the previous conveyance to *Sykes*; this circumstance shews that *Clarkson* derived his title under the conveyance of 1793, and from the erroneous conclusion of law upon which that conveyance was founded; and it also affects him with notice of that failure in the title.

Mr. *Sharpe*, Mr. *Koe*, Mr. *Coots*, and Mr. *Elmsley*, for the Defendants.

The presumption will be in favour of bona fide purchasers, whose title had been undisturbed for twenty years; and, therefore, in the absence of evidence that *Clarkson* had actually any knowledge of the deed of 1793, before the completion of his purchase, or that he claimed or derived title under that deed, the Court would not presume, against him, that he must necessarily have done so. If the Defendants are to be bound by the recital, it must be by the whole of that recital. The Plaintiffs are not at liberty to take one part and reject the other; and if the whole recital is taken, then the title of the Defendants appears. *Earl of Montague v. Lord Preston* (b). The

(a) 1 Russ. 601.

(b) 18 Vin. Ab. p. 163, tit. Recital, pl. 9; S. C. Vent. 140.

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[169] purchasers from *Sykes* cannot, after his death, explain the recital; but several "interpretations may be suggested, not inimical to the validity of the title of *Sykes*. *Brown*, the vendor, might have cancelled the first contract (the estate of *Cowling* being insolvent), and might have made a new contract with *Sykes*; 1 *Sugden, Ven. & Pur.* 306, ed. 10th; *Whittaker v. Whittaker* (a); or the widow might have assigned the benefit of the contract to *Sykes* by a letter to *Brown*, or any other form of memorandum; or it might have been conditionally assigned, in the event of the marriage taking place;—or, at the utmost, the recital that "thereupon" (i. e. the marriage) *Sykes* became entitled, is only a mistake in fact: it is not to be read as "thereby." At least, when the recital may be consistent with the truth, the contrary will not be assumed. *Tenny v. Jones* (b); *Lewis v. Davison* (c). The length of time during which the Plaintiff, with a knowledge of her alleged rights, has acquiesced in the possession of the Defendants, deprives her of any right to the assistance of a Court of equity. *Stockley v. Stockley* (d); *Stat. 3 & 4 Will. 4, c. 27, s. 27*.

 VICE-CHANCELLOR :—

The argument which has been addressed to me in this case, requires that I should observe on three points. First, excluding the time that has elapsed, I am to consider how the case would stand if the bill had been filed against *Sykes* in his lifetime? Secondly,—still excluding the question of time, what is the position of the Defendants, supposing them to claim under *Sykes*? Thirdly, how far the time that has elapsed ought to affect the question?

[*170] "Now, if this were the case of a bill filed against *Sykes* in his lifetime, I should have, as against *Sykes*, to determine simply the construction of the recitals contained in the purchase deed of 1793. I put this point without going into any question of the right of the Plaintiff to relief, if the general case of the Defendant is sustained. It has not been argued before me, that

(a) 4 Bro. C. C. 20.

(b) 10 Bing. 75; *S. C.* 3 M. & Scott, 472.

(c) 4 Mee. & Wels. 654

(d) 1 Ves. & Be. 23.

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if the property did in point of fact belong to the wife, and the conveyance was taken during the coverture, that *Sykes* could, in that case, as against his wife, claim to be entitled to the property. The argument has been wholly directed to shew, that I ought not, in the circumstances of this case, to presume such was the state of the title; at least, that I ought not to presume it against the parties who are the Defendants upon this record.

[His Honor stated the purchase-deed of 1793 (a)].

Now, unless I am to disregard the plain and obvious meaning of language, it would be impossible, in a case in which *Sykes* was living, and the Defendant in the cause, that I could put any other interpretation upon these recitals than this:—that the property was advertised for sale; that on a day fixed for the sale, *Cowling* attended and became the highest bidder at such sale (which clearly imports a sale by auction, if that were material, which I think it is not); and that *Cowling*, who is so stated to have become the purchaser, made his will, and devised the property to *Ann*, his widow, afterwards *Ann Sykes*. It is obvious that the meaning of this is, that *Ann Sykes*, as devisee of *Cowling*, had become the owner of the property; and when the deed states, that, upon the marriage of *Sykes* with the devisee of *Cowling*, *Sykes* "be- [171] came entitled to the property, it appears to me, that I should be spelling out a meaning against the plain and obvious sense of the language, if I did not understand the deed to state, that in consequence, and by the effect of, the marriage, *Sykes* became entitled to the property. In point of fact, the only substantial question that can be asked with respect to this recital is, whether *Sykes* does not intend to represent that he was about to take a conveyance from *Wade Brown*, in execution of the contract for the sale of the property to *Cowling*? I am clear, upon reading these recitals, that it is impossible to put any other construction upon the contract as against *Sykes*; and that is the construction which I must put upon the deed, unless I can find any reason in the altered situation of the parties,

(a) *Ante*, p. 163.

1842.—*Neesom v. Clarkson.*

or otherwise, to regard it differently. If, therefore, I were trying the question against *Sykes*, I should construe the deed as stating, that by the effect of the marriage of *Sykes* with the devisee of *Cowling*, he had become entitled to call for a conveyance to himself of the property which *Cowling* had contracted to purchase.

The property having been conveyed to *Sykes*, I have next to advert to the question as against the *Clarksons*. In 1817, *Sykes* conveyed the property to *Clarkson*.

[His Honor stated the deed of the 30th of September, 1817(a)].

The material recital here is, that, "by certain conveyances in the law, the property had been granted and conveyed to the use of *William Sykes*, and *Lucas Nicholson*, and their heirs; nevertheless, as to the estate and interest of *Lucas Nicholson* and his heirs, in trust for *William Sykes*, his heirs and assigns for ever." It appears, therefore, that this property, the identity of which [*172] *with the property comprised in the deed of 1793 is not in dispute, was, in 1817, conveyed by *Sykes* to *Clarkson* as the purchaser.

Another deed, the deed of 1793, having come out of the possession of the Defendants who claim under *Cowling*, is then put in evidence. This deed conveys the identical property to *Sykes*. The property which the Defendants had purchased, is the property comprised in the deed of 1793; which, by that deed, was conveyed to *Sykes*. *Sykes*, in the deed of 1793, recites the title I have mentioned; and as these parties claim under *Sykes*, it is impossible, unless *Sykes* had a different title to the property from that acquired by the deed of 1793, that the recitals of the deed of 1793 should not be evidence (I will not say conclusive) against *Clarkson* the purchaser. On the plainest principles of law, the recitals contained in that purchase deed of 1793 must be evidence against all parties to whom *Sykes* may have conveyed the property he has thus purchased; and he does, in 1817, convey the property to *Clarkson*. I do not say that that conveyance is necessarily conclusive. I am very far from saying it is so; and if this case were one in which the Plaintiffs had

(a) *Ante*, p. 165.

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stated the general case against the Defendants, and upon coming into Court for the first time, had surprised them by the production of this deed, the bare possibility, that there might have been some intermediate or collateral title, might have entitled the parties to an inquiry, with the view of shewing what the title of *Sykes* really was. All I am stating now against the Defendants is this, that *prima facie* I must presume the title that *Sykes* conveyed in 1817, was the same title which he took in 1793; I must presume it, unless some reason can be given to me for shewing why I ought not to act on that presumption. But the Defendants have had the opportunity of bringing *forward, if they were able, a [*173] case to shew that such presumption is not well founded, and knowing what their own title is they have not done so. I do not look into the answer for the purpose of giving the Plaintiff the benefit of any evidence to support and make out his case; I take the Plaintiff's case to be made out by the presumption I have already adverted to, and I refer to the answer for the purpose of seeing whether a case is there suggested which I ought to inquire into further, before I give the Plaintiff the benefit of that presumption which I think is raised in his favour by the production of the deed.

The Plaintiff, however, in strictness is entitled to have his case put higher. The deed of 1817, although it recites generally a title in *Sykes*, expressly refers to the conveyance under which *Sykes* became entitled; and that is stated to be a conveyance by which the property was conveyed to the use of *Sykes*: and *Nicholson*,—to *Nicholson* as a trustee for *Sykes*: and the mention of *Nicholson* in the deed of 1817 is material, because it identifies the deed thus referred to with the deed under which *Sykes* took the conveyance in 1793. And the rule of law I take to be perfectly clear, that wherever you find one deed referred to by another, the person who claims under the deed referred to is bound, at his peril, to ascertain the contents of that deed. I believe the rule of this Court to be in accordance with what Sir *John Leach* said in the case of *Jackson v. Rowe* (a), that every purchaser is presumed to have investi-

(a) 2 Sim. & St. 475.

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gated and known his vendor's title ; and if nothing more were proved in this case than the mere fact that the purchaser took a conveyance in 1817, and upon inspecting the title which was assumed to be conveyed to him, it appeared that it was one which in truth gave no title to the vendor, the Court would consider the onus [*174] thrown on the purchaser *to shew why he had not inquired into that title with a view to his protection. It appears to me indispensably necessary that such should be the law of this Court, for otherwise a purchaser might take a title, shutting his eyes to a defect in it, and then, on the ground of the absence of actual knowledge, require this Court to pronounce a judgment in his favour against the right of the party justly entitled to the estate, nothing but wilful blindness or culpable negligence could have prevented him from knowing the real state of the title.

In this case, however hard it may be on the parties who may have innocently paid their money for the estate, it is impossible, looking at the case upon the answer, which does not suggest any other title in *Sykes* than that which appears upon the deed coming out of the possession of the Defendants,—it is impossible, if I am to affect them with notice of what their professional adviser knew, or must be presumed to have known, that I can suppose the real state of the title to have been unknown to them.

I must therefore, as against *Sykes*, have construed the deed in the way I have mentioned ; and I must presume the Defendants to have had notice of the actual state of *Sykes'* title, and to have purchased under that title. I must deal with the case, as against them, as I should have dealt with it against *Sykes*, unless the length of time is to make any difference.

With regard to the lapse of time ;—there was a continuing coverture from the time of the purchase in 1793, until the death of Mrs. *Sykes*. [1] The title then descended on the female Plaintiff ; this happened during her infancy, and it was not until August, in the year 1825, that she attained her age of twenty-one years.

[1] As to the effect, in a court of Equity, of statutory limitations, and laches, and staleness of demand, see note 3 to the case of *Steele v. Coll*, 1 Young & Coll. p. 51.

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This is the earliest moment from which I can reckon the time. "There was then a period of five months before [*175] her marriage, during which there was no disability. Taking, however, the whole period of ten years and a half before the bill was filed, which is the utmost time that, in fact, elapsed, it is clear that it constitutes no bar to the claim; and being no bar, it clearly is not a case in which this Court can raise a presumption to destroy the title of the Plaintiff. The question therefore comes to this, whether there has been such delay in asserting the title, that the Court should presume in favour of the Defendants, that which it would not presume in favour of *Sykes*. The great difficulty in the Defendants' way is this;—that I could not in any possible view of the case raise a presumption in their favour, which would not, according to the way that I have read the deed, be contradicted by the words of the deed. If the words were equivocal, or ambiguous, or doubtful, and if a case were suggested in the answer as to the existence of any other title, I might possibly, in the circumstance of great delay, have raised a presumption in favour of the Defendants; but I cannot raise a presumption in the Defendants' favour against what I think is the plain and obvious meaning of the language of the recitals.

If these parties bought the estate on the supposition that they were purchasing an estate free from defect of title, they have great reason to complain of those who advised them; but I am satisfied I cannot, consistently with the rules on which Courts of justice proceed, do otherwise than make a decree in the Plaintiff's favour; and I must make a decree with costs, for when the claim was once asserted, the parties were bound, at their peril, to see if they had any ground for resisting it: having in their possession this deed of 1793, and having no ground for suggesting any intermediate or other title in *Sykes*, under which the Defendants could derive a title different from that contained in the deed of 1793, it *appears to [*176] me they must have contested this only for the chance of anything that might arise in their favour, and not because they have been advised, they could resist it successfully, if the truth of the case were disclosed.

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THIS Court doth declare the Plaintiff, *Martha Duncan Neesom*, entitled to the fee-simple and inheritance of the hereditament called the *Angel Inn &c.*, in &c., as the heiress-at-law of *Ann Sykes*; and the Plaintiffs, by their bill, offering and undertaking to make good any residue of the purchase-money contracted to be paid by *John Cowling*, in &c., for the purchase of the said estate, as in &c., after taking the accounts hereinafter directed, it is ordered, that it be referred to the Master to take an account of the purchase-money so contracted to be paid for the hereditaments in question in this cause, and for interest thereon, at 4l. per cent. per annum, since the 9th day of September, 1821; and &c. take an account of what, if any thing, has been expended by *William Sykes* and *Benjamin Clarkson* in &c., or by the Defendants, or any of them, for necessary repairs and lasting improvements on the said estates, and &c. compute interest at 4l. per cent. per annum on what &c. so laid out, and &c. the amount of such last-mentioned principal and interest be added to the amount of purchase-money and interest; and &c. take an account of the rents and profits received by the said *Benjamin Clarkson* in his lifetime, and by the said Defendants, or any or either of them, on account of the said estate, since the said 9th day of September, 1821, or which without his or their wilful default, might have been so received; and in case it shall appear that the Defendants, or any or either of them, have, or has been in possession of the said estate, or any part thereof, during any time or times since the said 9th of September, 1821, then &c. fix an occupation rent or rents &c., take an account thereof, and include the same in the said account of the rents and profits. [Direction to tax the Plaintiffs their costs of this suit: set off monies found due on account of rents and profits, and the said costs, against the sum found due on account of purchase-money and interest, and repairs and improvements, and interest. Master to certify to whom the balance is due, and upon payment by the Plaintiffs to the Defendants of the sum, if any, found due to them on the balance, or in case the balance is owing to the Plaintiffs, then the Defendants to reconvey the said estate free of incumbrances, by the said *Benjamin Clarkson*, or by any claiming by, from, or under him or them, to the Plaintiff, *Martha Duncan Neesom*, or as she shall direct, and deliver over to her all deeds, papers and writings in their custody or power relating thereto. If any balance is owing to the Plaintiffs, the Defendants to pay the same.] Usual directions.

 1842.—*Christian v. Field*.

**CHRISTIAN v. FIELD.*

[*177]

1842: 24th and 25th November, and 3rd December.

The Plaintiff in a creditors' suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mortgagee, or a party entitled to a lien on the title-deeds.

The solicitor of the executrix and devisee, paying a sum of money in exoneration of an adverse claim on part of the testator's estate, does not, as against creditors of the testator, necessarily and by force of the transaction alone, acquire a lien upon the estate, or on the title-deeds, for the sum which he so paid.

The solicitor of the executrix having paid a sum which was due to a third party, who had a lien on title-deeds belonging to the testator's estate for the amount, gave a receipt for the deeds in the name of the executrix, and, as her solicitor, carried into the Master's office her examination, in which the sum he had so paid was stated to have been paid by the executrix, and was allowed accordingly:—*Held*, that the solicitor must, in such circumstances, be presumed to have made the payment on the behalf and on the personal security of his client; and that he could not claim a lien upon the deeds for the amount.

THE Plaintiff instituted a creditors' suit—*Christian v. Chambers*—against the executrix and devisees of the debtor, and a decree was made for the sale of the real estate of the testator for the payment of his debts. The Defendant *Field* had been the solicitor of the testator, and was the solicitor of the executrix in the cause; and he claimed a lien on the title-deeds of the real estate of the testator, which were in his possession: these deeds or muniments were of three classes, and liable, as was alleged, to three several claims. First, copies of court rolls, deposited with the Defendant, by the testator, as a security for costs, of which no bill had then been delivered, but in respect of which the Defendant alleged, by his answer, that 74*l.* was at that time due. Secondly, certain deeds which were, at the death of the testator, in the hands of a certificated conveyancer, whose claim, amounting to 8*l.* 8*s.*, the Defendant *Field* had paid, and to whom a receipt for the deeds had been given in the name of the executrix,—*Field* affixing his name as a witness. And, thirdly, certain other deeds relating to property, an adverse claim to which had been set up, after the testator's death, by strangers,—and had been compromised for a small sum of money, 5*l.* of which was paid

 1842.—*Christian v. Field.*

by the Defendant *Field*, who prepared the release executed on that occasion.

The present bill was filed (as supplemental to the [*178] *suit of *Christian v. Chambers*) against *Field* and the Defendants in the original suit; alleging that the sale directed by the Court could not proceed, owing to the detention of the title-deeds by the Defendant, and praying that *Field* might be decreed to deliver up the deeds, or, if it should appear that he had any lien thereon, to deliver them up upon payment of what might be found due to him in respect of such lien.

The defendant, by his answer, claimed a lien on the several grounds above stated upon the different classes of instruments.

It appeared that the solicitors of the Plaintiff had repeatedly applied for an account of the Defendant's demand, but had been unable to obtain a statement from him either of the deeds what he held or the amount of his claim: that an attempt had been made to examine him upon interrogatories before the Master, but that the Defendant had objected to such examination, and his objection had been allowed. The Defendant, however, had offered to prepare and deliver an abstract of the property comprised in the deeds in his possession at the Plaintiff's expense. It also appeared that the executrix in her discharge sworn in taking the account before the Master, and carried in by the Defendant *Field*, as her solicitor in the suit, (*Christian v. Chambers*), had taken credit for the sums in respect of which the two latter claims of lien were made, as having been actually paid by her, as executrix, on account of the estate; and such payments were allowed to her in that account.

Mr. *Sharpe* and Mr. *Francis Bayley*, for the Plaintiff.

The second and third claims of lien cannot be sustained; [*179] *for the estate has been already charged with these sums by the executrix, with the cognizance of the Defendant in a proceeding in which he acted on her behalf. The first claim—the alleged lien on the copies of court rolls, if it be admitted to any extent—must be confined to the costs actually due by

 1842.—*Christian v. Field.*

the testator at the time of making the deposit: *Jones v. Tripp*, (a); *Hollis v. Claridge* (b); *Furlong v. Howard* (c). And it has been even said, that an equitable mortgage to a solicitor would not cover bills of costs not delivered when the equitable mortgage was made (d). The costs of the suit, occasioned by the unreasonable refusal of the Defendant to give up the documents or render any account, should be borne by him, and ought not to be treated as the ordinary costs of a suit for redemption.

Mr. Walker and Mr. E. Montagu, for the Defendant.

The Plaintiff has no title to sustain this suit; for the Defendant is accountable only to the executrix, who represents the estate. There is no allegation which can support this bill by a creditor against a debtor of the testator; and the objection is not removed by the attempt to make the present suit supplemental to the suit of *Christian v. Chambers*. The Defendant was not a party to that suit: he does not admit that the Plaintiff is "a [*180] creditor of the testator; and he has had no opportunity of disputing the alleged debt of the Plaintiff. The suit of *Christian v. Chambers* is *res inter alios acta*: the Defendant in this cause is neither bound by any thing which was done in that suit, nor is it evidence against him. The objection is not one of mere form; for the Defendant may be seriously prejudiced by having to contend with a stranger, and not with his own client. If sued by the executrix, the Defendant would simply shew that the executrix was indebted to him, and, as against her, he would be entitled to hold the deeds until he was paid; but the Plaintiff, by the present form of suit, seeks

(a) Jac. 322.

(b) 4 Taunt. 807.

(c) 2 Sch. & Lef. 115.

(d) *Ex parte Bovill, In re Evans*, August, 1826; 2 Mont. & Ayr. 382, n. (a). The case does not, however, appear, on examination of the book of the secretary of bankrupts, (No. 173, 1826, p. 388), to be an authority for the proposition stated in the report. The mortgage was made on the 3rd of February, 1819, and recited that 200*l.* and upwards was then due to the solicitor for costs. On the 19th of April, 1819, the solicitor delivered his bill of costs, amounting to 332*l.* 11*s.* 3*d.* The order on the petition declared him entitled to the benefit of the security for the sum of 200*l.*, "being the amount of costs incurred at the date of the indenture of mortgage."—*Mr. Ross*, for the petitioner.—*Mr. Phillimore*, for the assignees.

 1842.—Christian v. Field.

to recover the property, discharged from the liabilities of the executrix.

If this form of suit can be sustained, the Defendant must be protected by being allowed the same benefit of lien as he would have had if the executrix herself was Plaintiff; all the right which she could confer, the Defendant has acquired. With respect to the costs due at the time of the deposit by the testator, the lien is clear: *Williams v. Piggott* (a); *Warburton v. Edge* (b). And the lien claimed on the other deeds is, in respect of actual payments made by the Defendant, whereby the property was relieved from the claims of other persons; and, as to the second class of documents, the Defendant discharged an unquestionable lien, and he is entitled to stand in the place of the party thus paid off: *Glaholm v. Rowntree* (c). The defendant, as a mortgagee, was not bound to disclose his securities before payment: *Browne v. Lockhart* (d). The application for the particulars of claim were not accompanied by any offer to pay what was due to the Defendants; and there [*181] *is no ground, if any decree is made, for dealing with the case as to costs otherwise than as a common bill for redemption.

Mr. *Kenyon Parker* and Mr. *Stinton*, for the other Defendants.

Mr. *Sharpe*, in reply.

If a lien can be acquired by the solicitor of the executrix against creditors of the testator, it may, in the same manner, and on the same principle, be acquired in this suit by the solicitor of the Defendant, so as to render a third suit necessary, and then by the solicitor of the Defendant in that suit, and so on ad infinitum.

VICE-CHANCELLOR :—

The Plaintiff, having instituted a suit on behalf of himself and all the other creditors of the testator, in which he obtained a decree

(a) Jac. 598.

(c) 6 Ad. & Ell. 710, 716.

(b) 9 Sim. 508.

(d) 10 Sim. 421.

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for the sale of the real estate, has filed this bill, in order to carry out the sale so directed, by recovering the title-deeds in the possession of the present Defendant, treating it as supplemental to the former suit. The first objection which has been urged on behalf of the Defendant is, that it neither appears upon the bill, nor is admitted or proved in this cause,—called the supplemental cause,—that the Plaintiff is either a creditor or otherwise interested in the estate of the testator; and it is said that the Defendant *Field* not being a party to the other suit, in which the debt of the Plaintiff is established, that suit, as regards *Field*, is *res inter alios acta*, and the decree inoperative against the Defendant. The rule of law, that *res inter alios acta non nocet*, no doubt applies to protect the rights of a party from being prejudiced by a decision in another cause, in which he has had no opportunity of defending them; but it has no application to a case of this kind, where the proceeding, the effect of which is objected to, was properly constituted to determine the question then in contest, and where that question was determined between the only parties competent to contest it, namely, the creditors and the executrix. The result of that suit, by establishing claims upon the estate, may, if the estate is insufficient, affect the interest of the other creditors; but this effect must always attend a judgment recovered against a debtor, whose property is insufficient for the payment of his debts. And it would be not more unreasonable for the other creditors of a person in such circumstances to object to the operation of a judgment against their debtor, as being *res inter alios acta*, than it is for the Defendant to make the same objection in this case. The first suit has not, however, even the consequential effect I have adverted to upon the interests of the Defendant in this suit; for the question now is, what are the rights of the Defendant as mortgagee of property belonging to the estate of the testator, and it is unimportant to him whether he has to litigate that question with the executrix, as executrix, or with any established creditor or claimant on the estate. The Defendant may justly contend, that he is not liable, in respect of the documents in question, to the suit of any person who is not interested in the estate of the testator; but, if a party has established his

 1842.—*Christian v. Field.*

interest in the documents against those who represent that estate, it cannot be denied that he is entitled to enforce or give effect to the title or interest he has so established against any party in possession of the documents. Take, for example, the case of one who has obtained a decree for the specific performance of a contract [*183] tract for the purchase of an estate, and afterwards finds the title-deeds of the estate in the possession of a third party claiming a lien upon them: in such a case the interest which the purchaser has acquired under the decree would be a sufficient foundation upon which to demand, and, if necessary, to sue for the recovery of the deeds, although the suit for specific performance, as against the holder of the deeds, might be *res inter alios acta*: his lien or claim might not be affected; but the purchaser would be entitled, as against him, to enforce all such rights as the vendor could give, and had in fact given him.

The Plaintiff, in this case, has obtained a decree, in a suit against all proper parties, for the sale of the estate; and that decree is not impeached. He has thereby acquired a sufficient interest enabling him to sustain a suit, for the purpose of giving effect to and obtaining the benefit of the decree, and that is all which he now contends for. The question, then, is, what is the extent of lien to which the Defendant *Field* is entitled?

The deposit of the copies of the court rolls has been proved by the Defendant to have been made to secure the payment of his costs, and he is, therefore, entitled to them as a security for the costs due at the time of the deposit.

[His Honor stated the circumstances under which the claims of lien were made by the Defendant *Field* on the second and third classes of deeds (a).]

It has been insisted, with regard to the second of these [*184] claims, that, inasmuch as the conveyancer, in whose possession the deeds were, had a lien upon them as against the estate of the testator, the same lien was, on the payment by *Field*, transferred to him. This is by no means a necessary conse-

(a) *Supra*, p. 177.

1842.—*Christian v. Field*.

quence of that payment; and there are several reasons which prevent it having that effect in this case. In the first place, the deeds are delivered up to the executrix, and not to *Field*; and then the executrix, in her examination on oath, in which *Field* acts as her solicitor, states the payment to have been made by her, and the amount is allowed in her accounts accordingly. It would be impossible to treat the Defendant *Field* as a creditor of the estate for the same sum, without taking some steps to relieve the estate from the former payment. But the presumption rather is, that the first charge by the executrix is accurately made: nothing is more common than for a solicitor to advance money on the personal security of his client in cases of this nature. I am of opinion, that I ought to treat it as the payment of the executrix by the hand of *Field*, her solicitor; and that the solicitor has, therefore, no lien on the estate of the testator for that sum.

The third claim of the sum paid by *Field* in respect of the compromise of an adverse claim to part of the property of the testator, is even more clearly untenable than that which was last adverted to. The adverse claimants had no lien on the property, nor could *Field* acquire any such lien by the payment of the whole or any part of the price for which their claims were extinguished.

The only question which remains is that of the costs of this suit. The Plaintiff, by his bill, wholly denies the claim of the Defendant to a lien upon any document for any purpose whatever, and this justified the Defendant in carrying the suit to a hearing; for, to some extent, he *had* a lien. I think, therefore, [*185] the Plaintiffs are not entitled to costs against *Field*.

On the other hand, the claim of the Defendant goes much beyond what he was entitled to. Nor can I overlook the fact, that part of his claim is in direct contradiction to a case which, under his conduct as solicitor, Mrs. *Chambers* made and verified by her oath. I also repeat,—what I have before stated and acted upon,—that, in deciding upon questions of costs, not depending exclusively upon regularity of practice in the strict sense of the word, I shall always

 1842.—Rowlatt v. Cattell.

consider myself bound to see whether the parties, by reasonable care, might not have avoided the necessity for litigation (a).

[His Honor, adverting to the evidence of applications by the solicitors of the Plaintiff for the amount of the lien claimed before the institution of the suit, said that no satisfactory reason had been given by the Defendant for disregarding these applications. No costs of the suit should be given to *Field*. The decree to be, that *Field* should deliver up the deeds on payment of the other costs (exclusive of the sums disallowed), without prejudice to any right of the Plaintiff and the other Defendants to retain their costs of the suit out of the estate, or receive them in the other suit.]



[*186]

*ROWLATT v. CATTELL.

1842: 25th November.

An order to dismiss, for want of prosecution, obtained upon notice of motion, intituled in the name of the Plaintiff and three Defendants,—where one of the Defendants had been struck out by amendment,—discharged, with costs, as irregular.

THERE were three Defendants. The bill was amended, by striking out the name of one of them. Afterwards, one of the remaining Defendants gave notice of motion to dismiss for want of prosecution, and intituled the notice in the cause, naming all the three Defendants. The Plaintiff did not appear, and the order was made upon affidavit of service.

Mr. *Temple* moved to discharge the order, with costs, as irregular,—being obtained in a suit erroneously intituled: *West v. Smith* (b).

Mr. *Sharpe*, contra, said, the only question was, whether the order was obtained in the cause, or not? There was no irregularity or inconvenience in the circumstance, that a non-existing Defendant

(a) *Millington v. Fox*, 3 Myl. & Cr. 352; *Colburn v. Simms*, *infra*.

(b) 3 Beav. 306.

 1842.—*Goldsmid v. Goldsmid*.

was named: all the actual parties were named, and the notice and order were not the less operative as to them. If the order was not made in the cause, it was a nullity, and the Plaintiff had no ground to move to discharge it: *Sellas v. Dawson* (a): *Boddy v. Kent* (b).

THE VICE-CHANCELLOR discharged the order with costs.

GOLDSMID v. GOLDSMID.

[*187]

1842: 8th and 16th December.

Trustees of a fund, having a power to appoint the same to such or more of several objects of the power as the trustees should select, appointed the fund to trustees (of whom A., one of the objects of the power, was one,) upon trusts to be declared by a subsequent deed; and by that deed, to which A. and all the trustees were parties, the trusts of the fund were declared to be for the benefit of A. for life, with remainder, in equal shares, amongst four other of the objects of the power, subject to such limitations, in respect of the interest in their respective shares, to be taken as between themselves, their wives and issue, respectively, as A. should appoint. A., by will, limited the share of one of the appointees to trustees for the appointee, his wife and children,—the wife not being an (express) object of the original power:—*Held*, that the appointment was an effectual execution of the power,—being equivalent to an appointment to A., and a subsequent and independent settlement by A. of the fund which A. acquired by such appointment.

THE act 1 Geo. 4, c. 42, intituled, “An Act to authorize a composition for the debt remaining due to his Majesty from the late *Abraham Goldsmid*, merchant, and his surviving partners,” recited that, at the death of *Abraham Goldsmid*, a sum of 466,700*l.* was due to his Majesty from the co-partnership, and recited also a deed of inspectorship confirmed by a former act, (52 Geo. 3, c. 75,) whereby *Thomas Bainbrige*, *Alexander Baring*, *William Joseph Denison*, and *George Ward*, nominated by the Lords of the Treasury to superintend, direct and controul the administration of the property of the several concerns therein mentioned, were appointed inspectors accordingly; and it confirmed an arrangement to discharge the estates of the

(a) 2 Dick. 738; S. C. 2 Anstr. 458, n.

(b) 1 Mer. 316.

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parties on payment of a dividend of 17s. 6d. in the pound. The act then predeeded as follows:—"And be it further enacted, That so much of the property of the said *Aaron Goldsmid* and *Thomas Moxon*, and of the estate and effects of the said *Abraham Goldsmid* which shall be so acquitted and discharged as aforesaid, as, in case such acquittance and discharge had not been applicable to the payment in full of the said debt of 466,700*l.* and the said other debts, under the arrangement so acceded to on the part of the Crown, as hereinbefore is mentioned, shall immediately after such certificate as aforesaid shall have been signed by the commissioners of the treasury, or any three of them, be paid, disbursed, divided, or settled to, amongst, upon, or in trust for, or for the

[*188] *benefit of the said *Aaron Goldsmid* and *Thomas Moxon*, or their respective descendants, and the widow and descendants of the said *Abraham Goldsmid*, or any one or more of the aforesaid several persons, exclusively of the other or others of the said *Aaron Goldsmid*, and *Thomas Moxon*, or their respective descendants, and the widow and descendants of the said *Abraham Goldsmid*, and the same shall be an interest or interests vested in and paid and payable to them or any of them, on or at such age, day or time, or respective ages days or times, and be divided between and among them in such shares, and charged and chargeable with the payment of such annual or other sum or sums of money to them or any of them, and shall be upon such conditions, under such restrictions, and subject to such powers, declarations and agreements, and generally in such manner for the benefit of the persons hereinbefore mentioned or any of them, as they the said *T. Bainbridge*, *A. Baring*, *W. J. Denison*, and *G. Ward*, or the survivors or survivor of them, or the executors or administrators of such survivor, shall think reasonable, and shall by any deed or deeds, or instrument or instruments in writing, with or without power of revocation or new appointment, direct or appoint; and for that purpose be and be considered, deemed and taken as one fund, without any regard to the separate or conflicting interests, if any such conflicting interests there be, of the parties interested in the same, inasmuch as the concessions made by the said creditors, and hereby autho-

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rised to be made by the Crown, are to prevent any of them the said *Thomas Moxon*, *Aaron Goldsmid*, and *Nathan Solomons*, and the representatives of the said *Abraham Goldsmid*, or the legatees under the same or any other person or persons claiming or deriving any right, title or interest under the same, (so far as respects the trust fund, subject to the provision of the said indenture of the 27th of November, 1810,) *from having any [*189] claim or demand on the other or other of them, for any excess which they respectively may have paid beyond their due proportion of the debts of the said co-partnerships, or either of them, or the greater proportion of their respective property brought into the fund, subject to the provisions of the said indenture of the 27th of November, 1810, or the greater amount of the debts or demands to which they respectively were subject or liable."

A deed-poll dated the 24th of April, 1821, was executed by *T. Bainbridge*, *A. Baring*, *W. J. Denison*, and *G. Ward*, whereby, reciting their said powers, they disposed of seven twentieths and three twentieths of the fund which, under the arrangement and the act, had been released from the claims of the creditors, and they then directed, appointed, and declared, as follows:—"And the other or remaining ten equal twentieth shares or moiety thereof shall belong and be paid, transferred, and assigned unto the said *Ann Goldsmid*, *Daniel Eliason*, and *Isaac Lyon Goldsmid*, their executors, administrators, and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations intended to be declared and contained concerning the same, for the benefit of the said *Ann Goldsmid*, the widow, and *Moses Goldsmid*, *Esther Goldsmid*, *Mary Levein*, and *Elias Goldsmid*, children of the said *Abraham Goldsmid*, and their issue, by and in an indenture already prepared and engrossed, and intended to bear date the day next after the date of these presents, and to be made between the said *T. Bainbridge*, *A. Baring*, *W. J. Denison*, and *G. Ward*, of the first part, *Thomas Moxon* of the second part, the said *Ann Goldsmid*, *Daniel Eliason*, and *Isaac Lyon Goldsmid* of the fourth part, and moreover that the said indenture, so *already prepared [*190]

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and engrossed, shall be forthwith executed by the several parties thereto accordingly."

By an indenture of the 25th of April, 1821, being the deed referred to, and executed by all the parties, as expressed in the preceding deed-poll, reciting an agreement that the property should be disposed of as therein-after mentioned, it was expressed that, in pursuance of, and in obedience to the said deed-poll, and in consideration of the premises,—it was thereby agreed and declared between and by the parties thereto, that they the said *Ann Goldsmid*, *Daniel Eliason*, and *Isaac Lyon Goldsmid*, and their executors, administrators, and assigns, should, subject to the power of revocation reserved by the said deed-poll, stand and be possessed of, and interested in, all and singular the ten equal twentieth shares or moiety by the said deed-poll appointed unto them, of and in the remaining funds or property thereby distributed, upon trust from time to time to lay out and invest the said trust monies, and, during the life of the said *Ann Goldsmid*, pay the interest, dividends, and annual produce of the same unto or permit the same to be received by the said *Ann Goldsmid* and her assigns, for her and their own benefit; and that from and immediately after the decease of the said *Ann Goldsmid*, the said trust monies and the interest, dividends, and annual produce thereof should be divided into four equal shares, and one of such shares allotted to each of them the said *Moses Goldsmid*, *Es-ther Goldsmid*, *Mary Levein*, and *Elias Goldsmid*, and the shares so respectively allotted to each such son or daughter of the said *Abraham Goldsmid*, to respectively remain and be upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations in favour or for the benefit of the son or daughter to whom such share should be

[*191] allotted, and his respective wife and child or children, *or her respective child or children (as the case may be), with such provisions for his or her or their respective maintenance and education, and at such time or respective times and in such shares and manner, and with such limitation over in favour of all or any other of such sons or daughters to whom such shares are so respectively allotted, and their, his or her respective issue, as the

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said *Ann Goldsmid* by her last will and testament in writing, or any codicil or codicils executed as therein mentioned, should direct or appoint; and in default of such direction or appointment, and so far as such direction or appointment, if incomplete, should not extend, then the said share so respectively allotted to each such son or daughter as aforesaid should respectively remain and be in trust for him or her respectively, and his or her respective executors, administrators, and assigns, for his or her absolute benefit.

Ann Goldsmid by her will dated in December, 1825, expressed to be in exercise of her power under the said deed-poll and indenture, appointed the fund amongst the four sons and daughters of *Abraham Goldsmid*, who were to be the objects of it; and with regard to one share she directed that the trustees or trustee thereof should from time to time apply and dispose of all or any part or parts of the same unto or for the benefit of *Moses Goldsmid* in such manner as they or he the said trustees or trustee should in their or his uncontrolled discretion think fit; and subject thereto should, during the life of the said *Moses Goldsmid*, pay the annual produce of the same, or of so much thereof as should remain unapplied and undisposed of under the trusts aforesaid, unto the said *Moses Goldsmid* for his own benefit, until he should assign, charge, or otherwise dispose of the same or any part thereof by way of anticipation, or agree so to do, or should do some act whereby the same or any part thereof, "if payable to himself, would become [*192] vested in some other person or persons, but in case the said *Moses Goldsmid* should assign, charge, or otherwise dispose of the same or any part thereof by way of anticipation, or agree so to do, or should do some act whereby the same or any part thereof would, if payable to himself, become vested in some other person or persons, then should thenceforth during the life of the said *Moses Goldsmid* apply the same annual produce in such manner as the said trustees or trustee should, in their or his uncontrolled discretion, think fit, for the benefit of all or any more exclusively of the other or others of them the said *Moses Goldsmid* and the person or persons who, under the trusts and provisions thereafter declared and contained, would, for the time being, be entitled to the same annual

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produce in case the said *Moses Goldsmid* were then actually dead, and should, after the decease of the said *Moses Goldsmid*, pay the said annual produce unto the widow (if any) of the said *Moses Goldsmid*, during her life if she should so long continue a widow; and after the decease of such widow in trust for the children or child of the said *Moses Goldsmid* in manner therein mentioned.

Ann Goldsmid afterwards died. The bill was filed by *Moses Goldsmid* against the other objects of the power, and the trustees of the fund, charging that the power of the trustees under the act had not been well executed, and praying a declaration that he was absolutely entitled to one fourth share of the fund.

Mr. *Tinney*, and Mr. *Calvert*, on the argument that the effect of the instruments was an unlawful delegation of a trust, ['198] cited *Combe's case* (a); *Alexander v. Alexander* (b); *Attorney-General v. Berryman* (c); *Ingram v. Ingram* (d); *Phipson v. Turner* (e); *Bray v. Bree* (g); *Sugden, Tr. on Powers*, p. 281—285; *Chance on Powers*, p. 699. And the wife or widow of the Plaintiff who would take an interest under the attempted disposition, was not an object of the power.

Mr. *Sharpe*, and Mr. *Goldsmid*, for the Defendants *Esther* and *Elias*, contended that the power of the trustees was absolute; they might have appointed the whole fund to *Ann*, or given her a general power of appointment over it; they had, in fact, appointed it to her, and by the same instrument she concurred in limiting her own power, and took it in a restricted form. None of the authorities were opposed to the validity of such an exercise of a power; and, on the contrary, they affirmed it: *Routledge v. Dorril* (h); *Wade v. Paget* (i); *Langston v. Blackmore* (k); *Tucker v. Tucker* (l); *Cutten v. Sanger* (m); *Tucker v. Sanger* (n); *West v. Berney* (o);

(a) 9 Rep. 75.

(c) Cited Id. 643.

(e) 9 Sim. 227.

(h) 2 Ves. jun. 357.

(k) Amb. 230.

(m) 2 Y. & Jerv. 439.

(o) 1 R. & Myl. 431.

(b) 2 Ves. 640.

(d) 2 Atk. 88.

(g) 8 Bligh, N. S. 568; S. C. 2 C. & Fin. 443.

(i) 1 Bro. C. C. 364.

(l) 13 Pri. 607.

(n) M'Clel. 424.

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Crompe v. Barrow (a); 2 *Sugd. Powers*, p. 78. An appointment in favour of the widow of an object of the power, was a disposition beneficial to the object of the power himself: *Doe dem. Duke of Devonshire v. Lord George Cavendish* (b); *Palliser v. Ord* (c); *Mansell v. Mansell* (d).

 VICE-CHANCELLOR :—

With a view to the opinion I am about to express, it will be sufficient to observe that, by the act 1 Geo. 4, [*194] a trust or confidence is reposed in the four gentlemen who are there named for the payment, division, or settlement of a fund derived from the estate of Mr. *Abraham Goldsmid* and his partners, and that the person for whose benefit they are to exercise that trust or confidence are to be *Aaron Goldsmid*, *Thomas Moxon*, or their descendants, and the widow and descendants of *Abraham Goldsmid*, or one or more of them, exclusive of the others. That is a power to be exercised for the benefit of certain objects, not including, in terms, the wives of any of the persons who are named as the objects of the power: the wives are not the objects of this power, unless they are so under the direction to settle for the benefit of the individuals named.

The fund having been ascertained, the gentlemen in whom this power is vested, on the 24th of April, 1821, executed a deed-poll. [His Honor stated the material parts of the deed-poll (e).]

The question in this cause arises with respect to the ten-twentieths, the trusts of which were to be declared by a deed dated the day after the date of the deed I have just mentioned. On the 25th of April, 1821, the indenture referred to was executed by all the parties, including *Ann Goldsmid*, and thereby, after reciting the agreement that the property should be settled and disposed of in the way therein mentioned, the indenture witnessed—[His Honor stated the substance of the indenture, and of *Ann Goldsmid's* will (g).]

(a) 4 Ves. 681.

(c) Bunb. 166.

(e) *Ante*, p. 189.

(b) 4 T. R. 741, n.

(d) *Willmot, C. J., Notes, &c.*, p. 31.(g) *Ante*, pp. 190—191.

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It is upon this exercise of the power expressed to be

[*195] given to Mrs. *Goldsmid*, whereby she appoints a "share of the fund in favour of the Plaintiff *Moses Goldsmid*, in the qualified way which the will specifies, and gives also an interest therein to his widow, that the question in this cause turns. *Moses Goldsmid* by his bill insists that the declaration of trust and the will of *Ann Goldsmid* have made a disposition of the fund which the act does not authorize; and he founds his claim in this suit on the ground that the declaration of trust and the will are inoperative on the subject with which they profess to deal. The argument for the Plaintiff was—that the trustees had, in effect, assumed a power to delegate to others the execution of the trust reposed in themselves—that a person in whom a trust or confidence was reposed could not so delegate it to others,—and that the declaration was therefore void. It was objected further that the deed authorized the creation of estates for the benefit of the wives or widows of the descendants of *Abraham Goldsmid*, which were not warranted by the power; and that the will itself carried out that illegal intention by giving an interest to the widow of *Moses Goldsmid*, who it was said was not an object of the power. On behalf of the Defendant it was said that a settlement upon the widow of one of the objects of the bounty would be a benefit to the party himself, and, therefore, that a direction to settle property for the benefit of a certain individual would, in fact, be properly executed by giving a part to his widow. The case of the *Duke of Devonshire v. Lord George Cavendish* (a) was referred to on this point, and that of *Alexander v. Alexander* (b) might also be added. In answer to the argument on the main question in this cause, whether there was an unlawful attempt to delegate the trust, it was said that the de-

[*196] clarification of trust of the 25th of April, 1821, had a "two-fold operation,—that it operated, first, as an appointment to *Ann* absolutely, and, secondly, as a settlement by *Ann* as such appointee; and if that proposition can be made out, then I am of opinion that the deed of trust of the 25th of April, 1821, and the

(a) 4 T. R. 741.

(b) 2 Ves. 640.

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execution of the power given to *Ann* by that deed, would constitute a perfectly valid appointment.

There is no doubt that cases of the description which the latter argument supposes have been decided, but before I expressed any opinion upon it I desired to see under what restrictions such a mode of executing a power was placed by those cases. It is clear that where a person has a power of selection out of a number of given objects, he must have very great influence over each of those objects. Now if the donees of the power thought it right, in the exercise of the discretion confided in them, to give the whole to one object absolutely, they might have given it to *Ann*, and *Ann*, by a separate deed, might have disposed of the property as she thought fit; but it appeared to me impossible to deny the force of the observation that, where the donee of the power makes the appointment in the way which is done by this deed, to which the appointee is a party, the case might be open to the suspicion of the exercise of undue influence to induce the appointee to dispose of the property in favour of persons who were, in truth, not the objects of the bounty of the appointee, but of the donee of the power.

I have examined the cases on the subject (a), and I find that they lay down the rule with great clearness, *and bear out the proposition that, in equity, a valid appointment [*197] may be made to persons who are not objects of the power, with the approbation of the persons who are the objects of the power; and the case is explained in the manner in which it was put in argument, namely, that the deed operates in two ways, first, as an appointment by the donee of the power, and, secondly, as a settlement by the appointee of the property in question; and I do not find that the suspicion which possibly might attach to the disposition, has induced the Court to place cases of that description under any sort of control. In the simple case where there has been nothing more than the concurrence of the donee of the power and one of the objects of the power, to whom an exclusive appointment might be made, or to whom an appointment might be made co-extensive with

(a) See the cases collected—*Bugden, Tr. Powers*, Vol. 2, p. 281—285, 6th ed.

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the amount of the property disposed of, the Court has treated the appointment as valid and effectual. That point being expressly decided the only question is, whether this case is governed by the same rule.

I think the cases to which I have adverted are quite decisive to this extent, that if the estates created by the will of *Ann* had been inserted in the deed of appointment itself, instead of being left to be carried out by the will of *Ann*, those estates would have been perfectly good, although the estates were not given to persons who are named as objects of the power in the act of Parliament. The cases expressly decided it on the principle I have before mentioned ; that is, an appointment to *Ann*, and then a settlement by *Ann* of the property she so acquired. If then the estates would have been good, had they been actually set out and created in the deed of the 25th of April, 1821, the question is, whether any difficulty arises from the circumstance that they are left to *Ann* afterwards to appoint. Now, if the power given by the appointment had been a general power to *Ann*, there would have been that which the Court considers as equivalent to a gift of the property ; and then the case of *Bray v. Bree* (though not wanted as an authority) would have borne out the proposition that the power was well executed. But it was argued on behalf of the Plaintiff, that the limitation imposed, in this case, took away that character from the appointment, and gave it the character of an unlawful delegation of power. If, however, the general gift would have had the effect attributed to it, I confess it appears to me at least open to argument whether, in the case of a limited gift of property, the trustees being expressly authorized to limit the property, it would not have been sufficient ; but I think it is much safer to put this question upon the broad ground which the cases I have referred to establish, namely, that where the appointee, an object of the power, joins in the deed of appointment, and the deed shews that that which is done has been so done by agreement with that party, the Court considers that party as making a settlement of the property. If *Ann*, therefore, to whom unquestionably an exclusive appointment might have been made, agrees that the property shall be

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make whether the property is given to *Ann* in the form of an interest, or whether a control over the property is given to *Ann* in the form of a power. The act complained of is not, according to the construction of the cases, the act of the donee of the power, but it is the separate act of *Ann*, which she acquired the power of exercising by means of the appointment first made by the donees of the power.

The only shadow of distinction which I can discover is, that *Ann*, to whom the powers are given, is not named
 *as a separate party to the deed, she is named as one [*199] amongst several trustees. If *Ann* had been named as a separate party in the deed it appears to me the case would not have admitted of a doubt, for then it would have been simply that *Ann*, to whom, according to the construction I have mentioned, the estate is appointed, agreed that the property should be so settled; and when I find *Ann* is one of the parties—one who assents and agrees to the arrangement, and the appointment is actually made to *Ann* herself, it appears to me it would be a departure from the principles already established by the cases I have mentioned, to draw any distinction between those cases and the present. I have no doubt, therefore, that I am bound to declare that these instruments constitute a valid execution of the power.

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[*200]

1842: 21st and 22nd Nov., 5th Dec.

Devise and bequest of freehold, copyhold, and personal estate, upon trust for sale at the discretion of the trustee, and that the rents, interest, and proceeds should be divided amongst a class, either equally, or in other proportions as the trustee having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest, and proceeds for the benefit of such of the class as were unmarried or unsettled, and particularly for the comfortable support of P., (one of the class), who was of weak mind; and in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint having regard to the said intentions. The trustee by deed directed the manner in which the estates should be sold, and the proportions

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of the proceeds applied, and directed the division thereof amongst the other objects to be postponed until after the death of P., and nominated other persons to execute the trusts, which might remain unexecuted at his (the trustee's) death, and directed them to distribute the surplus proceeds of the estates amongst other objects according to their exigencies:—*Held*, that the trustee, for the government of his own discretion, might properly have regard to the directions of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; that the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P., and that the attempt to delegate powers which the trustee could not transfer, did not validate the directions in the same deed which he had power to give.

ALICIA SUSANNA HITCH, by her will made in 1824, duly executed to pass freehold estates, devised all her real estate unto and to the use of *W. Leworthy*, clerk, his heirs and assigns; upon trust to sell the same, but with power at his will and pleasure to suspend such sale, and let or demise the same or any part thereof for the best rent that could be had, and she gave and bequeathed the monies to arise from such sale, and the rents and profits to be received by her said trustee until such sale, and all other her monies, to the said *W. Leworthy*, upon trust (after payment of her debts) for all and every child or children of her late father, *James Hitch*, who should be living at the time of her decease, to be divided between them, either share and share alike, or in any other proportion or proportions, which should be in the discretion of her said trustee, always having respect to the advantages arising from education, promotion, or other provision which one or more of such child or children might have over the others, to be paid, assigned, or transferred to them or any of them at the respective ages of twenty-one years, or as soon afterwards as her said trustee should think fit; and she declared it should be lawful at all times for her said trustee to sell

[*201] any part of the said estates, and to apply any part of the monies arising from such sale, and of the rents or profits to arise from the said estates, towards the maintenance, education, bringing up, or otherwise promoting the interest and benefit of such of the said child or children as might be minors, and towards the maintenance and otherwise promoting the interest and benefit of such child or children as should be twenty-one and up

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wards, according to the discretion of her said trustee ; and she appointed the said *W. Leworthy*, her executor, and also residuary legatee.

In 1827, the testatrix added the following codicil, which was attested by one witness only :—" My intention expressed in my above-written will is, that the rents of my estates and the monies arising from the sale of the same, after the payment of my debts, shall be applied towards the education, maintenance, and advancement in life of such my father's children as may be unmarried or unsettled in any profession or business, and particularly towards the comfortable support of *Philip Hitch*, in case he should not be able to provide for himself, according to the discretion of my said trustee ; and when all such children shall be provided for, married, or otherwise settled in any profession or business, and a sufficient and comfortable maintenance set apart by annuity or otherwise for the said *Philip Hitch*, then my will is, that the remainder of the money shall be divided according to the directions of my will ; but in case my said trustee should not live to execute the several trusts contained in my will, and this explanation of my intention, then my will is, that all such parts of the said trust which shall remain unexecuted shall be carried into execution by any person or persons, and in any manner concerning the sale of the said estates, the application of the rents and division of the monies arising from the sale thereof, in such share or shares, proportion *or proportions, as [*202] my said trustee may, by his last will or any other writing duly executed in the presence of three or more credible witnesses, direct and appoint; always having regard to the true intent and meaning of my will, and the foregoing explanation of my intention." At the time of the death of the testatrix, eight children (four sons and four daughters) of her father were living, (including the said *Philip Hitch*). The will and codicil were proved by *W. Leworthy*, the sole executor. Two of the children, ~~*William and Mary*~~, afterwards died.

W. Leworthy executed a deed of appointment, dated the 19th of December, 1831, reciting the will and codicil, and reciting that he had accepted the trusts and fully intended and purposed to ex-

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ecute the same ; but in conformity with the said will and codicil, he did thereby appoint his wife, *Charlotte Leworthy*, and her two nephews, *John* and *James Jenkyn*, or the survivor of them, or the heirs of the survivor, to carry into execution all the trusts of the will and codicil, which at his death should remain unexecuted. And he thereby directed the survivor of them, or the heir of such survivor, to sell the *Duxford* estate (part of the said trust-estate), and out of the monies so arising to pay, first, the incidental expenses ; secondly, a debt owing to him (*Leworthy*), on his executor's account ; thirdly, to invest the proceeds and apply the rents, profits, and dividends towards the maintenance, education, and promotion in life of *Frederick*, *Mary*, and *Philip Hitch*, in case the legacies under the will of their father should be insufficient, they being the only children of the testatrix's father then unmarried or otherwise settled in life ; and further to apply such rents, profits, and dividends to the

account and credit of the said *Frederick* and *Mary*, un-
 [*203] til the sums so applied should amount to the same sum which their brothers and sisters, who had their support and education previous to their father's death, received under his will, amounting to 732*l.* each. And he thereby further directed the said nominees, or the survivor of them, or the heir of such survivor, to sell the *Ipswich* estate (other part of the trust-estate), and invest the produce, and apply the rents, profits, and dividends in replacing a sum of 400*l.* and interest to the credit of the four eldest children of the testatrix's father, being sums advanced by them to pay their father's debts, as part of their respective shares, pursuant to the bequest of the said will and codicil. And he then proceeded as follows :—" I further direct, that after the rents, issues, and profits of both estates, and also the said funds shall have been applied as aforesaid, and all the said six children shall have had an equal benefit, as if they had been all educated and arrived at the age of twenty-one at the time of their father's death, then to apply the said rents and profits towards the support, maintenance, and advancement in life of any of the said children who may stand most in need of assistance, in case the said *Philip Hitch* should not require the whole or and part of such rents and profits and dividends as thereafter direct-

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ed : and whereas the said testatrix was desirous to provide a sufficient and comfortable support for her brother *Philip Hitch*, who, from his youth, shewed great weakness and unsoundness of mind, and incapacity of learning any trade, business, or profession, and he appears now to have made a very little if any, progress towards improvement. Dr. *Sutherland* of *St. Luke's Hospital*, was soon after the testatrix's death consulted as to the best mode of proceeding with him as to his education, diet, and general treatment, who, after a long attentive consideration, pronounced that he was not responsible for his actions and recommended him to the care of Mr. and Mrs. *Platten*, with whom he has "been living [*204] for many years, and of whom he was, and still says he is, very fond, and to live as he had hitherto done, so long as he could do so with safety to himself and others, and by no means to place him under any fresh control. Mr. *Platten*, who was present, had instructions to watch him, and, in case of any appearance of change, to take him again to Dr. *Sutherland*. Now, in pursuance of that part of the trust under the provisions of the will of the said testatrix, who engaged me solemnly to promise that her said brother should not be placed in any madhouse, or other place of confinement for persons of unsound mind,—I do hereby direct the said appointees from time to time, as often as necessary, to consult the said Dr. *Sutherland*, or some other physician of the said Hospital, as to the management of him in every respect, in case he should continue to be incapable of managing himself. And, after the whole of the vested property, which he is entitled to have under his father's will shall be expended, then to apply such part of the rents and profits of the said estates as might be absolutely required for his comfortable support, and the remainder (if any) to be divided between his brothers and sisters, in proportion to their several wants, so that no part of the principal sum may be taken during the term of his natural life: and, after his death, the money arising from the sale of the *Duxford* estate to be equally divided between his surviving brothers and sisters; and the money arising from the sale of the *Ipswich* estate to be given to one or more of such brothers or sisters as may stand in most need of assistance, without favour, preju-

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dice, or partiality,—it being consonant to the said will and codicil and to her positive direction.”

The bill was filed in 1833 by some of the children of the testatrix's father against *W. Leworthy* and *Philip Hitch*, praying
 [*205] an account of the trust estate, and that, after a sufficient provision for *Philip*, the surplus might be equally divided.

By the decree in March, 1835, an account was directed, and also inquiries for the heir-at-law of the testatrix, and the children of the father,—of the situation of the parties beneficially interested, having regard to the directions in the will,—and whether a sale of the real estates would be beneficial,—reserving further directions and costs,—and declaring that the decree was to be without prejudice to any question as to the power and discretion of *Leworthy*.

In November, 1837, *W. Leworthy* died, having appointed the said *Charlotte*, his wife, and *John* and *James Jenkyn*, his executors, and also trustees to execute the trusts of the testatrix's will. A supplemental decree against these parties was made in 1839, declaring that the trust estates had become vested in *Charlotte Leworthy*, and directing the accounts to be carried on. In February, 1841, a further supplemental decree was made to perfect the suit against the said *Philip Hitch*, a lunatic, and his committee. Separate reports were made, and the freehold and copyhold estates of the testatrix were directed to be sold. On the general report, made in December, 1841, the cause came on for further directions.

Against the claims, under the deed of appointment, on behalf of *Philip*, the lunatic, it was insisted that the codicil, not being so executed as to pass freehold estate, could only affect the copyhold and personalty; that as to the freehold the interests of the parties must be governed by the will exclusively; that the power of appointment given to the trustee was not intended to be executed by an appointment disposing of the whole of the property at once, but
 [*206] by a discretion continuing during the lifetime of the trustee, and to be exercised from time to time according to the exigencies of the different objects; that the deed of ap-

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pointment, if binding on the property, would have the effect of frustrating the power of the trustee himself; that the trustee had no power to delegate his authority to others, or, if he had that power, he could not also dictate to the substituted trustees the manner in which they should exercise the authority. And it was said, therefore, that the Court could execute the trust only by giving the objects of the testatrix's bounty equal interests in the residuary estate; or at least by giving them equal interests in the produce of the freeholds, and by dividing the residue of the estate equally, after setting apart a maintenance for *Philip*.

Mr. *Sharpe** and Mr. *Metcalf*, for the Plaintiffs.

Mr. *Koe*, for *Philip*, the lunatic.

Mr. *Wray*, Mr. *Blunt*, Mr. *Glasse*, and Mr. *Shebbeare*, for the other parties.

VICE-CHANCELLOR,—after stating the facts:—

It was argued that the codicil operated only with respect to the copyhold estates, and the personalty. This argument is founded on a proposition, which, in theory, is no doubt true; and for some purposes, is true in practice, but it is not so for all purposes. The will, in this case, gives *Leworthy* powers large enough to do much that he has absolutely directed to be done during the life or continued incapacity of the lunatic; and the codicil certainly does not restrain it. Admitting that the powers given by the codicil would not authorize **Leworthy* to do some matters as to free- [*207] hold, which he might as to copyhold, there is no reason why he should not, in the honest exercise of the discretionary powers given under the will, have regard to the known wishes of the testatrix, whether those wishes were obligatory or not. Her wishes communicated in conversation would not be obligatory; but there is no reason why he should not attend to them in the exercise of his discretionary powers; and, if he might, for that purpose, have regard

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to conversations not having any testamentary force, I do not see why he may not regard mere wishes, notwithstanding he derives his knowledge of them from the language of the codicil,

Referring then to the will alone, does that authorize any and which of the dispositions of the trust property which *Leworthy* assumed the power to make by the deed of appointment of December, 1831? It was said that the discretion to be exercised by him was a discretion to be exercised from time to time according to the exigencies of the case; that he might from time to time dispose of the property absolutely, but that he could not by anticipation direct in what manner it should be divided at a future time. Giving full effect to this argument it would in no respect invalidate those directions in the deed of December, 1831, which were made upon a view of facts then present to the mind of *Leworthy*. I find nothing in the argument I have referred to which should prevent *Leworthy*, in December, 1831, from directing that the *Duxford* property (part of which was freehold) when sold and converted into money,—and the rents before the sale,—should be applied in paying the expenses of the sale, in discharge of debts and charges affecting it,—that the surplus should, in the next place, be applied in

aid of the legacies given under *James Hitch's* will, in
 [*208] the maintenance, education, and promotion of certain
 of the children of *James Hitch*; and in the next place
 in making up a sum of 732*l.* to *Frederick Richard* and *Mary*, so as
 to equalize pro tanto the position of those parties with that of their
 brothers and sisters: nor in directing that the proceeds of the sale
 of the *Ipswich* estate and the rents until the sale should be applied
 in replacing a sum of 400*l.* with interest, to four of the children of
James Hitch, being sums advanced by them for the payment of
James Hitch's debts (the express object of the above direction
 being to put all the children upon an equality). Nor do I see why
Leworthy should not have had power, in December, 1831, with re-
 ference to his knowledge of the state of mind and health of the
 lunatic, to determine and direct that no part of the capital should
 be divided between any of the parties interested during the life of
 the lunatic; and that an income sufficient for the comfortable sup-

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port of the lunatic should be the first charge upon the property or some part of it.

I may observe that, but for the extraordinary advance in the value of the property since *Leworthy's* death, (which appears to be owing to the construction of the Eastern Counties Railway), I see no reason to suppose that the direction which requires the capital not to be divided during the lunatic's life, was other than provident and proper. With respect to the other directions in the deed of December, 1831, the direction to the nominees to sell has been superseded by the act of the Court; but I cannot accede to the argument that a want of power in *Leworthy* to delegate to the nominees that ministerial act (so far as it related to the freehold) would invalidate the disposition he made of the property when sold, and of the property until the sale, if that disposition were itself within his powers; nor do I think that an ineffectual attempt on the part of **Leworthy* to delegate to the nominees the [*209] discretionary division of the income of the freehold not required for the lunatic's comfortable support, and the discretionary division of the capital, so far as it arose from freeholds after the lunatic's death, would invalidate an otherwise valid direction, as to the immediate application of parts of the income of the property, in equalizing the situation of the children.

At present I shall give no opinion as to the validity of the discretionary powers attempted to be given to the nominees, so far as they relate to the freeholds, nor, if invalid as to the freeholds, whether that will affect the delegation of power as to the copyholds and personal estate; nor, if that discretion cannot be exercised, in what manner the Court is to deal with the fund so far as it may be undisposed of.

I regret the necessity of postponing the final decision of the case, after the delay which has already occurred, but I cannot usefully attempt to adjudicate upon the questions I have referred to, until further information shall have been elicited by the inquiries which will be directed by the present order.

[His Honor stated the inquiries which should be made.]

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DECLARE (the Plaintiffs and Defendants in the suit of *Girdlestone v. Hitch*, by their counsel, consenting) the former decrees dated respectively the 20th day of March, 1835, the 26th day of July, 1839, and the 12th day of February, 1841, and the accounts taken and inquiries made thereunder, are binding upon the parties to the suit of *Girdlestone v. Hitch*, as upon the parties to the several former [*210] suits. The Master to inquire and state who was the heir of *Alicia *Susannah Hitch*, the testatrix, according to the customs of the manors whereof her copyhold estates were holden, living at the time of the decease of the said testatrix, and who is now such customary heir, and for that purpose &c. If the said Master shall find that *John Hitch*, in &c., is such customary heir, then it is ordered that the said Master do inquire and state to the Court whether *Mary E. C. Hitch*, one of the children of *James Hitch* the father &c., who were living at the death of the testatrix and since deceased, had attained the age of twenty-one years at the period of her decease, or whether she died without having attained that age. The Master to state the amounts produced by the sales of the several real estates of the said testatrix, freehold as well as copyhold, and how such amounts and any interest or dividends thereof or accrued therefrom have been and are invested; and in taking the accounts thereof, and ascertaining such amounts, the Master to distinguish and state what several parts of such amounts and investments respectively have arisen from and represent the produce of the *Ipswich* estates, and the produce of such of the *Duxford* estates as were freehold, and the produce of such of the *Duxford* estates as were of copyhold or customary tenure. And *Frederick R. Hitch*, and *James W. Hitch*, and *Worham Hitch*, as incumbrancers upon the share of the said *Frederick R. Hitch*, and the said *James W. Hitch*, as the heir-at-law and customary heir and administrator of the said *Mary E. C. Hitch* deceased, by their counsel, waiving any claim or interest which they might have had under or by virtue of the deed of appointment of the 19th of December, 1831, in respect of the maintenance, education, or promotion in life of the said *Frederick R. Hitch* or the said *Mary E. C. Hitch*, in case the legacies under the will of their father should be insufficient for the same, or in respect of any claim on the part of the said *Frederick R. Hitch* and *Mary E. C. Hitch*, to have any rents or profits or dividends applied to their account or credit until the same, from time to time so applied, should amount to the same sum which their brothers and sisters, who had their support and education previous to their father's death, received under his will, and which in the said deed was stated to amount then to the sum of 739*l.* to every one of them, so that they the said *Frederick R. Hitch* and *Mary E. C. Hitch* might have the equal sum when they should have attained the age of twenty-one, and their education completed; and the said *Worham Hitch* and *Elizabeth* his wife in right of the said *Elizabeth*, and the said *Charlotte Girdlestone* and *James W. Hitch*, in her and his own right only, and *W. B. Girdlestone* and *Eloisa* his wife, in right of the said *Eloisa*, by their counsel, waiving all claim and interest which they respectively might have under or by virtue of the said deed of appointment, to have replaced the sum of 400*l.* with interest at &c., to the credit of the four eldest children of *James Hitch* the father, namely, *Elizabeth*, *Charlotte James W.*, and *Eloisa*, being sums advanced by them for payment of [*211] *part of their father's debts, the Master to inquire and state what annual

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sums of money ought to have been allowed for the purpose of providing a sufficient and comfortable maintenance for the said *Philip C. B. Hüch*, for the time past, since the 25th day of March, 1837, as well as for the time to come, regard being had to the amount of the vested property which he was entitled to have under his father's will, and what proportion of the Bank 3l. per cent. Consols, standing &c., ought to be set apart to provide such future maintenance.

WOODGATE v. FIELD.

1842: 4th and 7th of July, 10th, 21st, and 23rd Nov.

In a suit by a creditor on behalf of himself and all other creditors, if the debt of the Plaintiff be admitted or proved, and the executor or administrator admits assets, the Plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account.

A mistake of the law or practice of the Court is not, per se, a ground for allowing a party to go into further evidence, on facts at issue at the hearing of the cause, *semble*.

THE Plaintiff, claiming to be a creditor of the intestate, on a promissory note, filed his bill on behalf of himself and all other creditors, against the administrator, for payment. The Defendant, by his answer, admitted assets, but denied the debt, and suggested that the pretended promissory note was a forgery.

The Plaintiff went into evidence, and proved the note. At the hearing,

Mr. Teed, and Mr. Bagshawe, for the Plaintiff, asked for the immediate decree of the Court against the Defendant, for payment of the debt. *Wall v. Bushby* (a).

Mr. Girdlestone, and Mr. Alfrey, for the Defendant.

The decree must be for an account in the usual way. The admission of the executors does not entitle the Plaintiff to a personal decree, without giving the other creditors an opportunity of contesting the claim. *Owens v. Dickenson* (b). The practice uniformly is to direct the account only in the first instance. *Seton*

(a) 1 Bro. C. C. 488, per Lord Thurlow.

(b) Cr. & Ph. 48.

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[*212] *on Decrees*, *p. 52; *Attorney-General v. Cornthwaite* (a); *Gray v. Chiswell* (b); 2 *Dan. Chan. Pr.* 854.

Not only have the other creditors of the inestate an interest which may be opposed to the Plaintiff, but they have an inchoate interest in the prosecution of the suit, and, if it be not dismissed, they have an interest in requiring that it shall be prosecuted in such a manner as will give them the benefit of it. *Sterndale v. Hankinson* (c); *Connop v. Hayward* (d). An immediate decree would operate as a surprise on the Defendant, who had expected that he should be able to contest the debt before the Master. *Tomlin v. Tomlin* (e).

Mr. Teed, in reply.

Other creditors have no interest in the suit; the Plaintiff might dismiss his bill at any time before decree; and the Defendant might also have paid the debt and costs, and procured the bill to be dismissed before the hearing. *Pemberton v. Topham* (f); *Holden v. Kynaston* (g).

VICE-CHANCELLOR:—

The suit is instituted by a simple contract creditor on behalf of himself and all other creditors, seeking the payment of a debt alleged to be secured by the promissory note of the inestate. The Defendant, by his answer, says he believes the note to be a forgery, and that no debt was due to the Plaintiff, but admits assets sufficient to pay the amount, and all other debts of the inestate.

[*213] He suggests no ground for his belief as to the debt and note. Evidence has been gone into on the part of the Plaintiff to prove the debt, and he asks an immediate decree for payment. The Defendant says it ought to be referred to the Master to take the account, not only of the estate, but of what other debts are owing from the testator. This inquiry is said to have two

(a) 2 Cox, 45.

(c) 1 Sim. 398.

(e) Ante, Vol. 1, p. 236.

(g) 2 Beav. 204.

(b) 9 Ves. 123.

(d) 1 Y. & C. C. C. 33.

(f) 1 Beav. 216.

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objects: one that the Plaintiff's debt may be proved in the Master's office; the other that the rest of the creditors may have an opportunity of getting their debts paid in the suit. In a creditors' suit, where there is no admission of assets, that is no doubt the usual form of the decree, and though the Plaintiff may have proved his debt at the hearing, it may still be displaced by evidence in the Master's office; but the question is, whether that form of decree is applicable when assets are admitted?

The reason for, and the principle of, the usual form of decree, are stated in *Owens v. Dickenson* (a), but that reasoning has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for payment of the Plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails.

I entertained no doubt upon this point, nor can I, upon inquiry, find that it was ever doubted in the other branches of the Court. In effect, the rule is proved by the fact that the creditor and the Defendant, the executor, may settle the matter pending the suit, by the latter paying the debt and costs of the suit. And it has twice been decided at the Rolls, that the Court will order the same thing to be done, even when the suit had proceeded [*214] to a considerable extent. If then the Court would compel a creditor to accept payment of his debt when the executor offers to pay it, with the costs of suit, where is the line to be drawn, beyond which the Plaintiff cannot be allowed to have the exclusive benefit of his own suit. I am satisfied that in this case there ought to be a decree for immediate payment.

It was objected, however, that in *Sterndale v. Hankinson*, Sir A. Hart said, that, on the filing of a creditors' bill, every creditor has an inchoate right in the suit; the meaning of that expression is, that a right then commences which may indeed fail, but may also be perfected by decree; and it is not inaccurately called an inchoate right. After the decree, every creditor has an interest in the suit;

(a) Cr. & Ph. 48.

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but the question is, whether the Plaintiff, until decree, is not dominus litis, so that he may deal with the suit as he pleases. There is nothing to prevent other creditors from filing bills for a like purpose ; and there is nothing more common than for several suits to exist together, and the Court permits them to go on together until a decree in one of them is obtained, because it is possible, before the decree that the litigating creditor may stop his suit.

The only question then is, whether the Plaintiff has sufficiently proved his debt. The Defendant admits that he saw the note before putting in his answer : he therefore knew what was upon the face of it. It purports to be signed by the intestate, and it has two attesting witnesses. They depose that it was produced to them, written as it now appears, except that the interlineation of the name of the payee was omitted : that the interlineation was inserted in their presence, and that it was then signed in their presence by the intestate : I see no ground for saying that the evidence [*215] was not sufficient. *It is quite clear that it would be sufficient at law. The Defendant might have cross-examined the attesting witnesses ; or, if necessary, he might have filed a cross-bill for discovery. There is no evidence that the note was a forgery, and no statement of the ground for that suggestion.

The only point suggested at the bar as a reason why the decree should not now be made, was, that the practice was supposed to be different, and that therefore the Defendant should have an opportunity of contesting the debt by a trial at law. If, upon a special application, the Defendant can shew that there was in fact a slip, which will operate as a surprise upon him, and will undertake in any event to pay the costs of the trial,—rendered necessary by his own neglect,—unless the Court shall otherwise order, I will consider whether I am at liberty, at the hearing of the cause, after the case is fully proved, to entertain such an application. Such an application is not to be acceded to, except under special circumstances.

The Defendant presented his petition for leave to enter into evidence, either before the Master or otherwise, to disprove the existence of the Plaintiff's debt, alleging in effect that the legal advisers of the Defendant had considered it to be the practice of the Court, not, in

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the first place, to make any other decree than for an account, where the bill was by a creditor, on behalf of himself and all other creditors. Affidavits were filed by the Defendant for, and by the Plaintiff against, this petition. The Defendant also presented a common petition of rehearing.

*Mr. *Kenyon Parker*, and Mr. *Alfrey*, in support of [*216] the first petition, cited *Hood v. Pimm (a)*, *Marten v. Whichelo (b)*, *Cox v. Allingham (c)*, *Edney v. Jewell (d)*, *Hughes v. Eades (e)*.

Mr. *Teed* and Mr. *Bagshawe*, contra.

In none of the cases cited has liberty been given to supply evidence on the identical question which constituted the substance of the dispute in the cause, after the party has had full opportunity of bringing forward his testimony at the proper time. Such a relaxation of the practice opens the very danger, against which the strictest rules of the Court as to the examination of witnesses, and the publication of testimony, are designed to guard. Even in a cross cause, which a party has an unquestionable right to institute, he cannot avail himself of evidence taken in the cross cause, touching the very matters in which the parties were at issue in the original cause. *Pascall v. Scott*, *Scott v. Pascall (f)*, *Wilford v. Beaseley (g)*, *Ridley v. Obee (h)*, *Taylor v. Obee (i)*.—They cited also *Young v. Keighly (k)*, *Marten v. Whichelo (l)*.

In support of the petition of rehearing,

Mr. *Kenyon Parker*, and Mr. *Alfrey*, contended that the answer had sufficiently put in issue the consideration for the note, to cast upon the Plaintiff the necessity of proving that consideration. *Mills v. Barber (m)*.

(a) 4 Sim. 101.

(b) Per Lord *Cottenham*, Cr. & Ph. 261.

(c) Jac. 337.

(d) 6 Madd. 165.

(e) Ante, Vol. 1, p. 486.

(f) *Vice-Chancellor of England*, 1842, not yet reported.

(g) 3 Atk. 501.

(h) 3 Pri. 26.

(i) Id. 83.

(k) 16 Ves. 348.

(l) Ubi sup.

(m) 1 Moo. & W. 425.

1842.—Fisher v. Tayler.

[*217] *Mr. Teed, and Mr. Bagshawe, for the plaintiff, relied on the evidence in the cause, as establishing the Plaintiff's case.

THE VICE-CHANCELLOR refused the prayer of the first petition, and dismissed it with costs, not on the absence of merits, raising a case of doubt as between the parties, but on the absence of any evidence of the alleged mistake of the practice, expressing an opinion that a mistake of law, even if proved, would not necessarily, and per se, have been a sufficient ground for affording another opportunity of giving evidence. With regard to the consideration, it was not enough merely to give notice to the Plaintiff to prove the consideration—the note prima facie imported consideration; but if any circumstances of fraud were shewn by the Defendant, the Plaintiff might then be required to go into evidence of the consideration. The rule in equity was the same as at law: *Easton v. Pratchett* (a); *Mills v. Barber* (b).

His Honor then stated the effect of the evidence, and concluded that there was so much difficulty arising out of the proofs which the Plaintiff had himself given, exclusive of the proof of the note, to render further inquiry proper, and directed the case to stand over, giving the Plaintiff liberty to bring an action on the note, with a declaration that the costs of the action should be, in any event, borne by the Defendant.

THE action was brought, and the Plaintiff recovered. Decree for payment of the debt, with costs.

[*218] *FISHER v. TAYLER.

1842: 9th, 10th, 12th, 13th, and 19th December. 1843: 18th, 19th, and 24th January.

(a) 1 Cr. M. & Ros. 798.

(b) 1 Moo. & W. 425.

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The implied authority of a partner to bind his co-partners for the re-payment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm; and therefore a party advancing money to one partner, knowing that it was for the latter purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority.

Two partners in a firm announced their intention of adding 16,000*l.* to their capital, by admitting one or more additional partners. *W.* entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of 4000*l.* to that partner by way of loan, on the security of the bills of the firm, and also of the separate estate of such partner:—*Held*, that *W.* had, so far as this evidence went, notice that the loan of 4000*l.* was an advance, not within the implied authority of the partner obtaining it, the other partner having authorized the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, and the advance might have been within the scope of the partnership authority, without reference to the proposed increase of capital, liberty was given to *W.*, for the purpose of trying that question, to bring an action on the bills against the executors of the other partner.

UNDER the decree in a creditors' suit for an account of the estate and debts of the testator, *D. F. Tayler*, a claim was carried in by *Simon Wilkin*, of the sum of 4000*l.* upon promissory notes in the name of a firm in which the testator was a partner. The debt arose in the following manner:—

In January, 1832, a partnership was formed between *Henry Shuttleworth*, *Joseph Wartnaby*, and the testator, under the firm of *D. F. Tayler & Co.*, for the manufacture of patent solid-headed pins, and it was agreed that *Shuttleworth* and *Wartnaby* should advance in moieties 8000*l.*, or such other sum as should be required for the patent and machinery, which was then to become the property of the partnership, in equal shares. *Shuttleworth* and *Wartnaby* were also to bring in 1500*l.* in money, to be considered as a debt, and bear five per cent. interest. If, at any future time, it should be thought necessary to increase the capital, such addition to be advanced in equal shares; and any partner advancing, with the consent of the other, more than by the articles he was bound to do, the same to be entered in the partnership books as a debt, and carry the like interest. *Wartnaby*, who, according to the representation of the De-

 1842.—*Fisher v. Tayler.*

pendants, brought in his required share of the capital, [*219] only by the assistance of *Shuttleworth*, died "in November, 1834 ; and, upon that representation, if the firm was then indebted to the estate of *Wartnaby*, the estate of *Wartnaby* was indebted to *Shuttleworth*.

In November, 1838, the surviving partners, *Shuttleworth* and the testator, caused the following advertisement to be inserted in the newspapers :—"Partnership. In a most highly respectable and well-established whole-sale mercantile concern, the very first house in its line in the Kingdom, an additional capital of about 16,000*l.* is wanted to extend the business and pay off a deceased partner's advances. It is therefore proposed to admit one or more gentlemen, whose shares will be proportioned to the amount of their capital. Principals or their solicitors addressing to V. R., post-paid, Law Club, Chancery-lane, may have the most candid explanation, and full particulars." *Wilkin* answered the advertisement, and shortly afterwards received the following letter :—

" 25th January, 1838.

" Sir,—Owing to the illness of the acting partner, your letter addressed to V. R. respecting the advertisement for a partnership was not opened till this morning. It is hoped that his health will be sufficiently restored by the middle of next week to enable him to give you a meeting, with a view to enter into the necessary explanation. We are instructed, therefore, to request you will attend at our office on Wednesday next, the 31st inst., at 11 o'clock, for that purpose, &c. " We remain, &c.,

" *S. Wilkin, Esq.*"

" *Battye, Fisher, & Sudlow.*"

Wilkin accordingly attended at the place appointed and met *Shuttleworth* and Mr. *Sudlow*, but no agreement was then made.

Mr. *Sudlow* stated that, to the best of his recollection, [*220] "the amount of capital *Wilkin* offered to advance was too small, and that the negotiation for a partnership went off, and was entirely abandoned.

Wilkin's state of facts thus represented the circumstances :—Mr. *Sudlow* (the solicitor of the testator, and occasionally of the

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firm) introduced *Wilkin* to *Shuttleworth* as one of the partners in the firm of *D. F. Tayler & Co.*, and a conversation then took place on the subject of the advertisement, in which *Shuttleworth* told *Wilkin* that the partners in the business were the testator and himself; that the testator, who was the active and managing partner, was prevented by illness from being present at that meeting; and that a large portion of the capital required was to replace that of a deceased partner. *Wilkin* then informed *Shuttleworth* and Mr. *Sudlow* of the amount of capital which he would be able to bring in; and after some further conversation, the treaty was adjourned. *Wilkin* afterwards employed Mr. *Wood* as his attorney, and being advised not to enter into a partnership, it was ultimately arranged that he should act as the accountant and superintendent of the firm, at a salary, and that his duty should be the management of their accounts, and cash account. The negotiation was continued by *Shuttleworth*, as such partner, on behalf of the firm, and by Mr. *Wood*, as the attorney of *Wilkin*, *Shuttleworth* stating, that the object for which the money was intended to be raised was to pay off the advances of a deceased partner, and for other partnership purposes, Mr. *Wood* advised *Wilkin* not to make the proposed advance to the firm, without the separate security of *Shuttleworth* as well as that of the firm, and *Shuttleworth* having acquiesced in that requisition. a memorandum, as heads of the agreement, was drawn up and signed, as follows:—

“Bond from *Henry Shuttleworth*, of *Market Harborough*, in the county of *Leicester*, to *Simon Wilkin*, of *Cossey, Norfolk*, for 4000*l.* at 5 per cent. interest, 3000*l.* to be paid down immediately, and the remaining 1000*l.* as soon as obtained by Mr. *Wilkin*, and in the meantime Mr. *W.* is to give Mr. *S.* a declaration, that, although the bond for 4000*l.* is given, 3000*l.* part thereof only is paid.”

“Agreement between the said *H. S.* and *S. W.*, that the said 4000*l.* is lent to *H. S.*, as the partner of *D. F. Tayler* and as part of the capital of the firm of *D. F. Tayler & Co. of Light-pool Mills, Gloucestershire*, and Nos. 9 and 10 *King-street, Cheapside*, patent solid-headed pin and brass wire manufacturers, and that the said *S.*

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W. is to be employed by the said firm, as assistant and superintendent, and general agent, at a salary of 200*l.* per annum, payable quarterly, together with the use and occupation of the house and furniture at *No. 10 in King-street*; and if *Mr. W.* relinquishes the use and occupation of the house in *King-street*, then he is to be allowed 80*l.* per annum, towards paying the rent &c. of another house. *Mr. W.* is to attend regularly to the business of the firm. Proviso that agreement and bond to be void on payment of the 4000*l.* and interest, and after six calendar months' notice by either party. Agreement to commence on the 25th of March next.—*Henry Shuttleworth.—Simon Wilkin.*"

On the 27th of February, 1838, *Wilkin* paid to *Shuttleworth* 1600*l.*, on the 1st of March, 1838, 1400*l.*, on the 16th of April, 1838, 500*l.*, and on the 28th of April, 1838, 500*l.*, making together 4000*l.* for which several sums *Shuttleworth* gave to *Wilkin* the promissory notes, in the name of the firm of *D. F. Tayler & Co. Shuttleworth* executed also his separate bond for 8000*l.*, con-
 [*222] ditioned for the payment of 4000*l.*, to *Wilkin*, at "six months' notice, and deposited with *Wilkin*, as a further security, the title deeds of certain real estate, the property of *Shuttleworth*.

Of the sum lent by *Wilkin*, a part (about 400*l.*) was proved to have been immediately applied in the payment of a partnership debt.

Wilkin entered upon his duty under his agreement, in May, 1838. The testator, having received a complaint from *Flick*, a clerk, whose office *Wilkin* was to fill, remonstrated with *Shuttleworth*, by a letter of the 28th of April, on the impropriety, on his sole authority, of superseding *Flick*; the testator afterwards, on the occasion of visiting the counting-house in *King-street*, appeared to have recognised *Wilkin* as a person whom he expected to find there. On the 31st of July, the testator caused a notice to be served upon *Wilkin*, distinctly apprising him, that he (the testator) had never seen, and knew nothing of any agreement between *Wilkin* and *Shuttleworth*; that *Wilkin* was not to consider himself employed by the firm, and that the firm would not be answerable for any wages, or other re-

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muneration for his services; that *Shuttleworth* had not authority to appoint him, and that he must look to the latter alone for his remuneration. And on the 30th of July, the testator caused a notice in the name of the firm to be delivered to *Flick*, directing him not to make any payment to *Wilkin*, as he was not employed by the firm.

On the 1st of January, 1839, the partnership between the testator and *Shuttleworth* was dissolved, and an agreement was made by which *Shuttleworth* was to become the purchaser of the partnership property. *Wilkin* subsequently acted as the clerk of *Shuttleworth*. *Shuttleworth* became bankrupt in December, 1839. It did not appear that *Wilkin* had ever demanded payment of the loan from the testator, until the 11th of January 1840, when the testator was served with a writ at the suit of *Wilkin*, against both *Tayler* and *Shuttleworth*, in an action of assumpsit for 4000*l.* and interest from the 19th of November, 1839. The testator died on the 2nd of February, 1840. *Shuttleworth* died in April of the same year.

The Master rejected the claim, and *Wilkin* excepted to the report.

Mr. *Sharpe*, and Mr. *Romilly*, for *Wilkin*, commented on the various circumstances in evidence, and submitted, as the necessary conclusion, that the 4000*l.* was borrowed by *Shuttleworth*, on behalf of the firm, for partnership purposes, and was actually employed in such purposes with the knowledge of *Tayler*, and that the loan had been made upon the credit of the partnership, and not upon the credit of *Shuttleworth* alone. And they adverted to the implied authority of a partner to bind his copartners, in respect of monies borrowed for partnership purposes, in the course of business; *Lane v. Williams* (a); *Rothwell v. Humphreys* (b); *Thicknesse v. Bromilow* (c); *Harrison v. Jackson* (d); *Swan v. Steele* (e); *Loyd v. Freshfield* (g); *Collyer on Partnership*, p. 268 *et seq.*, ed. 2; and to the absence of any facts affecting *Wilkin* with notice that *Shuttleworth* had not such authority.

(a) 2 Vern. 277.

(c) 2 Cr. & Jer. 425.

(e) 7 East, 213; per Lord *Ellenborough*.

(b) 1 Esp. 406.

(d) 7 T. R. 210; per Lord *Kenyon*.

(g) 2 Car. & Payne, 325.

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Mr. Teed, Mr. Lee, and Mr. Heathfield, for the [*224] *executors, contended, that the circumstances under which the negotiation originated,—the position of the partners at that time,—the material departure from the purpose intimated in the advertisement, which the agreement with *Wilkin* involved,—the separate security taken from *Shuttleworth*,—the repudiation by the testator of any contract with *Wilkin*, and the acquiescence of the latter after that repudiation,—all contributed to prove that the loan of 4000*l.* was not made to the partnership, but was an advance to *Shuttleworth* alone. And the conduct of *Wilkin* after the dissolution of partnership was not only confirmatory of the same fact, but was an adoption of *Shuttleworth* as the sole debtor : *Hope v. Cust* (a); *Thompson v. Percival* (b); *Arden v. Sharpe* (c); *Evans v. Drummond* (d); *Collyer on Partnership*, pp. 334, 385, ed. 2.

Mr. *Kenyon Parker*, for the Plaintiffs.

Mr. *Sharpe*, in reply.

The alleged acquiescence of *Wilkin*, after the testator had, by his letter, attempted to repudiate all dealings between him and the firm, has been used first, as evidence of the nature of the original transaction ; and, secondly, as affecting the right which *Wilkin* had previously acquired, and, in fact, discharging the testator. How can the debt, or the liability of either partner, be affected by the conduct of *Wilkin* at such time ? He might have been negligent then, but how does that affect his right ? It would be prejudicial, so as to found an equity for the testator, only if it had led the testator to do [*225] or omit some act which he otherwise would not have *done or omitted. The negligence of *Wilkin*, however great it might have been, could not have affected the conduct of the testator. *Wilkin* was at liberty to withhold any demand for his debt, without prejudicing his right to it, so long as it was not barred by the Statute of Limitations. And the same view of the case relieves it of the

(a) 1 East, 53.

(c) 2 Esp. 524.

(b) 5 B. & Abol. 925, 933.

(d) 4 Esp. 89.

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first observation founded upon the same abstinence on the part of *Wilkin*,—why is it to be inferred that the loan was not a joint loan because the creditor did not choose to enter into an angry correspondence with one of the joint-debtors? The reasonable course, especially of a party in the situation of *Wilkin*, was, to leave to the partners themselves the discussion of their relative liabilities.

VICE-CHANCELLOR :—After stating the facts,

The points which have been urged on the part of the estate of *Tayler* are, first, that the loan according to the truth of the transaction between *Wilkin* and *Shuttleworth* was a loan to the latter separately, and not to the firm. Secondly that if the loan was agreed to be made to the firm, it was made under such circumstances that the firm was not, and that the estate of *Tayler* therefore is not liable, to the debt; and thirdly, that if both of the first points were ruled against the estate of *Tayler*, that estate had become discharged by the subsequent acts of *Wilkin*.

I have endeavoured to discover some explanation of the case which should make its different parts reconcilable with each other. It occurred to me at first, that the true explanation of the original transaction might be found by giving a very critical and strict effect to the terms of the written memorandum which was signed by *Shuttleworth* and *Wilkin*, at the time the loan was [*226] agreed upon. The words are,—“agreement between *H. Shuttleworth* and *S. Wilkin*, that the said 4,000*l.* is lent to *H. Shuttleworth*, as the partner of *D. F. Tayler*, and as part of the capital of the firm of *D. F. Tayler & Co.*” Now, it appears that much importance was attached by *Shuttleworth* to the circumstance that the money was wanted for the purpose of and intended and agreed to be employed in the business, and for the benefit of the firm of *Tayler & Co.*; and it appeared to me not improbable, that whilst the loan was made to, and upon the credit of, *Shuttleworth* alone, the parties, or at least *Wilkin*, imagined that he would be entitled to recover against the firm, provided the money was applied for the benefit of the firm: but, I have been forced from that conjecture by

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the affidavit of Mr. *Wood*, the solicitor of *Wilkin* in the transaction; he avers, in the most distinct terms, that the loan was made to the firm; that he (Mr. *Wood*) himself proposed that *Shuttleworth* should give his separate security for the debt; and adding to this the fact, that the transaction commenced with an advertisement for a partner, who was to bring in money to enlarge the affairs of the concern, and pay a retiring partner, I cannot entertain any doubt but that Mr. *Wood* accurately represents what he, at the time, understood to be the true nature of the transaction. This is direct evidence, and evidence that I cannot reconcile with the conclusion to which the parties appearing for *Tayler's* estate ask me to come. I have been equally unsuccessful in my endeavours to reconcile the evidence before me as to the manner in which *Tayler* acted towards *Wilkin*, between the month of May and the 31st July, 1838. If *Tayler's* letters were evidence for his own estate, his letters of the 28th April, and subsequently, would clearly import that he was a stranger to the terms of the agreement upon which *Shuttleworth* and [*227] *Wilkin* had acted, and were acting, and that he disapproved of *Wilkin* being retained by the firm; and the affidavit of *E. Tayler* is to the same effect; but they are not strictly evidence for *Tayler's* estate; and the testimony both of *Flick* and *Crawley*, two unexceptionable witnesses, gives an opposite character to this part of the case. It is certain, however, that on the 31st July, 1838, *Tayler* took a very decided course for the purpose of recording the position he intended thenceforward to take up. In his letter of that date, delivered to *Wilkin* (a), *Tayler* disavowed or repudiated the acts upon which his liability is said to be established,—he rejected *Wilkin* altogether. No attempt has been made to shew that *Wilkin*, when thus challenged by *Tayler*, met that challenge by an assertion of the right which he now insists upon. It may be possible to reconcile *Wilkin's* conduct in that part of the case with his present claim, by supposing that *Shuttleworth*, having broken faith with him in not having applied the loan, or some part of it, for the benefit and purposes of the firm of *Tayler & Co.*, had influence enough over his creditor *Wilkin*, to persuade him not to

(a) *Supra*, p. 222.

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come to an open rupture with *Tayler* by then insisting on his claim. The then existing and subsequent connexion between *Shuttleworth* and *Wilkin* may well suggest the possibility of such an influence having existed.

The rest of the case is in much obscurity so far as any direct evidence might affect it, but it admits of explanation with reference to the actual and altered position in which the parties, from time to time, stood towards each other; provided the truth, as to those parts of the case to which I have adverted, can once be established. *Tayler* denied all privity between himself and *Wilkin*, and, therefore, consistently with that position, treated [*228] payments charged in the *London* books, as having been made to *Wilkin*, as payments made on account of *Shuttleworth* and debited *Shuttleworth* with those payments accordingly. The other acts of the parties will be found consistent with the arrangements between *Shuttleworth* and *Taylor*, which it was the object of the dissolution of the partnership to carry out; the latter facts will therefore throw comparatively little light upon the original transaction; they were in truth, produced wholly, or in a great degree, by the new arrangements, and were in the most part consistent with them.

Upon two points, however, I have come to this conclusion, first, that if the antecedent authority of *Tayler*, exclusive of the implied authority of *Shuttleworth* as a partner, was necessary to sanction the borrowing of the 4,000*l.*, on the credit of the firm; or, if subsequent ratification was necessary to give it effect against the firm, I cannot, without further inquiry, overrule the Master's finding. And, secondly, if the original liability be once established, I cannot hold that the firm has become discharged by anything in evidence before me.

I have, therefore, to consider,—and for this purpose I now mention the case, whether, at the time of the loan, *Shuttleworth* had an authority to bind his partner in this transaction, such authority depending upon the partnership relation only.

Upon the authorities cited I shall assume that one of several partners has an implied authority to bind his co-partner for the repayment of money borrowed for partnership purposes, in the ordi-

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nary course of partnership transactions (a)[1]. I take [*229] it to be equally clear *that, if a partner is acting beyond the scope of his authority as partner, and the party with whom he is dealing has notice that such is the fact, the absent partner will not be bound (b). The question is under which of those principles the present case falls?

I have ascertained that the Master decided against the claim of *Wilkin*, upon the ground that this could not be considered an ordinary transaction within the scope of the implied authority of a partner, and I have not yet heard anything to satisfy me that it can be so considered.

It is clear the original intention was that a new partner should be taken into the concern; this certainly would not sanction a borrowing in the way that has been adopted; for by the proposed arrangement, *Taylor* would have had the benefit of an increase of capital, but would have come under no personal liability in respect of the capital so obtained. And suppose *Wilkin* not to have known the circumstances, I cannot even in that case treat it as clear that an authority can in all cases be implied in a partner to bind his co-partner in borrowing money, for the purpose of raising an additional fixed capital to extend the business and pay off a deceased partner's advances. That was the purpose for which *Shuttleworth* borrowed, and

(a) *Ex parte Bonbonus*, 8 Ves. 540.

(b) *Collyer on Partnership*, pp. 261, 329, ed. 2. *Gow*, 54 et seq., ed. 3; *Story*, p. 193, § 128 et seq.; *Pothier, Tr. Ob.*, p 1, c. 1, § 88; *Contrat de Societe*, c. 6, § 101. Cases cited *supra*, p. 223.

[1] Under the implied contract between partners as it regards third persons, each partner may enter into any contracts or agreements on behalf of the firm in the ordinary trade and business thereof, or do any act incident or appropriate to such trade or business, according to the common course and usage thereof. See on this subject, *Story on Partnerships* § 102; 3 Kent Com. L. ch. 43, pages 40, 41, 42, 4th ed.; *Swann v. Steele*, 7 East R. 210; *Sandilands v. Marsh*, 2 Barn. & Ad 673; *United States Bank v. Binney*, 5 Mason 176; *Winship v. Bank of United States*, 5 Peters R. 529. 561. In the latter case Chief J. Marshall lays down the rule, "that a partner has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions, as entirely as himself. This is a general power, essential to the well conducting of the business, which is implied in the existence of a partnership.

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Wilkin lent, the money in question. Advances of money to carry on the transactions of an established concern may be good to bind the firm, though obtained by one partner only ; but suppose a concern not established, is there any implied authority in one partner to bind his co-partner by bills or otherwise, to raise capital ? Upon principle, I should say clearly not,—otherwise any partner might be made to contribute to the *payment of his co-partner's share of the capital to be raised. This view of [*230] the subject is supported by the case of *Greenslade v.*

Dower(a). Then if money is wanted by an established firm, not for its ordinary transactions, but for the purpose of paying off an outgoing partner,—of raising additional capital,—and carrying out new arrangements, does it necessarily follow, from the ordinary case, that each partner has an authority to make the other liable for the money to be raised for such purposes ? It is obvious that the money to be raised for such purposes should be contributed by the partners according to the special agreement between them at the time, and not that one partner who, peradventure, ought to provide the whole fund which the new arrangements may require, should by accepting bills in the name of the firm have power to throw on his co-partners the burden he ought himself to bear. I cannot but think that money required for extraordinary purposes and new arrangements, not comprehended in the partnership transactions of the old firm, constituting as it were a graft upon, or an addition to, an established firm, stands, for a purpose like the present, upon the footing of capital to be raised for the establishment of a new concern, and not upon the footing of money raised for the ordinary dealings of an old firm. Difficulty no doubt may exist if a party dealing with one member of an established firm lends money on a supposition that the money was borrowed for ordinary purposes. But here *Wilkin* had notice of the purpose for which the money was required, and of the special manner in which it was to be raised ; and must not that notice have informed him that some new and special contract between the parties was to regulate the proposed arrangement between them ; or, in other words, that this was not a case to which the implied authority of a partner to bind

(a) 7 B. & C. 635.

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[*231] "his co-partner could extend? This was the view the Master took of the case, and it appears to me to deserve more consideration than it has yet received at the bar.

I have gone into the case not to express any opinion upon it further than to explain what the point is on which I felt pressed. The parties, if they desire it, may, before I make up my mind on the case, speak to it again on the point I have at last adverted to.

Mr. Romilly for Wilkin.

The intimated desire to find another partner did not exclude every other authority to raise money. The business was to go on,—the estate of the deceased partner was to be paid, and it was equally necessary to provide for these purposes whether a new partner was found or not. If the advertisement did not enlarge the authority of *Shuttleworth*, on the other hand it did not abridge it. *Story on Partnership*, p. 225, § 146, 147, 148.

Mr. Lee, for the executors.

The memorandum of agreement excludes the argument now attempted. It is not an advance for ordinary purposes, but as "part of the capital." With the special information which the circumstances afforded him, and upon which he acted, he cannot now retire, and rest his claim upon the general power of a partner: *Sherreff v. Wilks* (a); *Doe v. Hilder* (b); *Saville v. Robertson* (c); *Smith v. Craven* (d); *Wilson v. Moore* (e).

[*232] "Mr. Romilly, in reply.

The word "capital" is rarely used in the very strict sense which is attempted to be put upon it. It ordinarily comprehends, as was here meant, the whole fund which is available for business, without distinguishing the mode by which it is raised.

VICE-CHANCELLOR :—

Tayler and Shuttleworth carried on trade together with an agreed

(a) 1 East, 53; per Lord Kenyon.

(b) 2 B. & A. 782.

(c) 4 T. R. 720.

(d) 1 Cr. & Jer. 500.

(e) 1 Myl. & K. 126.

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amount of capital; part of which had been withdrawn after the death of *Wartnaby*, and the survivors agreed to replace the capital so withdrawn, and also to raise the aggregate capital to the sum 16,000*l.* For this purpose additional monies were to be brought in so as to form a permanent increase of the capital; but it was to be raised in such a manner as not to charge *Tayler* personally. In point of fact from the beginning *Tayler* was exempted from bringing in capital, he was to pay no part of the 8,000*l.*, nor of the 1,500*l.*; he was only to bring in a share of the monied capital in case an addition should be found necessary, exceeding the 1,500*l.* to be brought in by the other partners. The advertisement, which is the act of both the partners, is therefore evidence of an agreement having been come to between *Tayler* and *Shuttleworth*, whereby the former agreed that the concern should no longer be carried on with the limited amount of capital, but that the same, as between the partners, should be increased, not by borrowing any money on the credit of *Tayler*, or by rendering him in any way chargeable for the increase, but by finding some person willing to advance the capital, in consideration of a share in the concern. This was the undoubted contract between the partners, and upon "the contract the ques- [*283] tion is, whether *Shuttleworth* had any authority to go in- to the market and raise money on the credit of *Tayler's* name as well as his own: that he possibly might have succeeded in charging *Tayler* by borrowing money of a person who was ignorant of this special contract,—I do not say to the amount or 16,000*l.*,—but that he might have charged him for ordinary partnership purposes, may be admitted; but if, having that advertisement in his hand, he goes to a person willing to lend money, and says "this is my authority to raise capital," can that person lend the money on the credit of *Tayler's* name and hold *Tayler* bound by the amount of that advance? I will suppose the contract between *Tayler* and *Shuttleworth* to have been that *Shuttleworth* should find the whole money, and *Tayler* should find no part of it,—if that appeared on the face of the contract, it is impossible that any person lending the money to *Shuttleworth*, for that very purpose, could say that *Tayler* was bound by it,—for on the face of the written authority he would in fact have notice that

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Shuttleworth was exceeding his authority when he made use of *Tayler's* name as a security for repaying the money. It appears to me that such a case would not be more conclusive than the case which has actually happened. How does Mr. *Wilkin* represent the case in his own state of facts? he says that he received an answer to his letter from the solicitor of the firm; that the meeting which took place between him,—that solicitor,—and *Shuttleworth*, was adjourned, without anything having been done; that an adjourned meeting was had, and that it was ultimately arranged that he should make the intended advance as a loan to the firm, and that he should act as accountant, at a salary; that the negotiation was continued and carried on by *Shuttleworth* as such partner on behalf of the firm of *D. F. Tayler & Co.*, and the object for [*234] which the money was intended to be raised was stated by *Shuttleworth* to be the payment of the estate of a deceased partner and for other partnership purposes. In point of fact having met to negotiate for becoming a partner and advancing capital, whereby *Tayler* could not have been subjected to any charge in respect of the capital so advanced,—instead of doing that—he declines to become a partner, and then, as he himself says, makes the intended advance as a loan to the firm; and not only receives notes by which the firm was to be bound, but at the same time enters into a very special agreement connected with the security. [His Honor stated the agreement (a).] It appears therefore plainly, that this is not the case of money borrowed merely for the general and current purposes of a firm, in which case no question could have been anticipated, but that it is a large sum of money advanced as part of the permanent capital of the firm, and advanced to a partner who, on meeting *Wilkin*, gave him notice that he had authority to borrow, but in a totally different way, and one which would be attended with very different consequences. It is not merely a common bill or note given in the ordinary course of business, but it is an advance accompanied by an agreement for the employment of this gentleman by the firm with a view to the protection of his own interest, —for giving six

(a) *Supra*, p. 221.

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months' notice of payment, and embracing other special terms. I have not the slightest doubt that, in a case of this description, where two partners have agreed to make a permanent addition to their capital, and to make it in a particular mode, that no party can, with knowledge of that special agreement, bind the absent partner in any way other than that which the special agreement would authorize. Suppose the case of two partners carrying on business with a capital of 2,000*l.* each contributing 1,000*l.* The [*285] operations of that firm are necessarily carried on to an amount proportionate to the employed means, and each partner is safe so long as the affairs of the concern are well conducted ; but if that capital is to be permanently increased, doubled, or trebled, or if the operations of the concern are to be so, monies advanced for that object cannot be treated as monies advanced for the ordinary purposes of the trade ; it is in fact wholly altering the character or the business. If, then, one of the partners agrees with the other that the capital shall be doubled or trebled, provided the other party will find the whole, it comes in principle within the reasoning of the learned Judges in *Greenlade v. Dower*, that if a bill could be accepted for this purpose the effect would be that, whereas one partner was to find all the capital or a portion of it, yet he would have the power to bind his co-partner to find the whole.

There would, as I have observed, be difficulty in the case of an established concern, if the money was borrowed from a party who had no notice. But here *Wilkin* had notice that the large sum of 16,000*l.*, being nearly double the capital previously employed, was to be raised in a given mode. Confining myself solely to this view of the case, if it stood alone, I could not but agree with the Master. Upon the attendant circumstances only, I should infer that the 4,000*l.* were advanced as part of the 16,000*l.*, and if the whole 16,000*l.* had been advanced I am satisfied there could not have been room for any question. But the case does not depend on inference alone ; it stands on direct evidence. It is so laid in *Wilkin's* state of facts, which is his bill for the purpose of this proceeding. And it was not (so far as my recollection goes) until after I had called for a second argument on the point, any attempt was made to

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[*236] treat the loan in question, as unconnected with the *sum mentioned in the advertisement. But, however that may be, it is unquestionable that *Wilkin* met *Shuttleworth* as a person authorized to raise money in a particular manner and for a special purpose, not falling within the scope of the dealings of the concern, and with full knowledge that such was the case he lent money upon a security which charged *Tayler*, a consequence which the manner of raising the money pointed out by *Tayler* would have excluded.

Then is there anything in the evidence before me to alter this view of the case? The evidence of *Wood* tends to confirm it; and, as the professional adviser of *Wilkin*, I cannot assume that he has not disclosed everything within his knowledge, material to his client's case. There certainly is evidence that *Shuttleworth* said he had communicated the matter to *Tayler*; but there is no direct evidence that *Tayler* knew anything of the transaction, unless it may be inferred from the evidence of *Flick* and *Crawley*, of what took place in *London*. This evidence is certainly of the most meagre kind. *Wilkin* was on the premises acting, or going to act, as clerk. *Tayler* came there when *Wilkin* was present, and he acknowledged *Wilkin* in a way which shewed he had heard of him before. No doubt he had heard of him from *Shuttleworth*, as a person treating to become a partner. Perhaps *Shuttleworth* deceived *Tayler*, by telling him he would become, or expected to become, a partner, and wished to look into the concern beforehand; but it is perfectly consistent with the transaction to suppose that *Tayler* had heard of *Wilkin*, and supposed *Wilkin* was there with a view to some transaction to be carried out, without knowing the fact that bills or notes had been given, by which *Tayler* himself might be bound. Any inference to be drawn from this evidence is far out-

[*237] weighed by the conduct of *Wilkin*, after the receipt *of the letter of the 31st of July. Instead of replying to that letter, by saying, "I advanced money to the firm, and *Shuttleworth* told me you were informed of it," he acquiesces from that time until *Shuttleworth* having become unable to pay, and *Tayler's*

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estate being apparently solvent, he sets up his demand. On the case before the Master, I have no doubt his conclusion was right.

There is another view, however, which may be taken of the case. It is true that there was 16,000*l.* to be raised by way of increase of capital, and in order to enlarge the transactions of the firm, but there is no suggestion that the old firm was not to go on in the meantime. On the contrary the very circumstance that the transactions were proposed to be enlarged, shews that the old firm was intended to be carried on until the increase of the capital should be raised; and it is not disputed that such was the intention of the parties. Now, if the old concern was to go on, undoubtedly all the partnership rights of *Shuttleworth*, and all the partnership liabilities of *Tayler* would remain with respect to that partnership. If it were necessary to borrow money with a view to preserve or carry on the old concern, there was nothing in the circumstance that they proposed to enlarge their partnership transactions, that would necessarily make it illegal in *Shuttleworth* to borrow money for their general purposes; and I understood Mr. *Romilly's* argument to be, that, inasmuch as it appears, the firm was much pressed at this time, and *Wartnaby's* estate was demanding payment of money, the 4000*l.* was a sum which reasonably might be necessary to carry on and preserve the old firm. There are thus, so to express it, two antagonist principles which might apply. I have the strongest impression that *Shuttleworth* was not justified in binding the firm in respect of any advance of the 16,000*l.*; at the same time, I have nothing to lead me *with certainty to the conclusion that he might [*238] not be justified in borrowing, or *Wilkin* in lending, money to some extent, with a view to carry on the old concern.

Wilkin may not have known that such borrowing was unlawful as between the partners. Although the parties are bound to bring forward their case in the first instance, and the Court, in general, holds them bound by that case; yet, considering the great injury to *Wilkin* on the one hand, if I confirm the report, and the comparatively small injury to the other party of the short delay which will be occasioned by my allowing *Wilkin* to bring an action,—and being satisfied there is a question to be tried more fit for the decision of a

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jury than of this Court,—while I think the Master was right upon the case before him, I think I am best consulting the ends of justice by giving *Wilkin* leave (if he is willing to incur the risk) to bring an action on the promissory notes, before I finally determine the case against him.

THE exceptions to stand over, and, in the mean time, *Wilkin* to be at liberty to bring an action on the notes against the executors of *Taylor*, it being admitted for the purposes of the action that *Taylor* survived *Shuttleworth*.

[*239]

KING v. SMITH.

1843 : 11th, 12th, and 13th January.

The Court will not, on the application of a mortgagee out of possession, restrain the mortgagor from proceeding to fell timber growing upon the mortgaged estate, unless the security is insufficient [1].

A mortgagee may sustain a suit against the executors of the mortgagor, for a sale of the property comprised in the security, and for the payment of any deficiency out of the general estate of the testator—*semble*.

What proportion the value of the mortgaged property should bear to the mortgage debt, in order to be deemed a sufficient security within the rule under which the Court acts in restraining waste by the mortgagor—*quære*.

W. SMITH conveyed and surrendered certain freehold and copyhold estates to the use of *J. Reid* and his heirs, by way of mortgage, to secure 2,700*l.* and interest. *W. Smith*, by his will, gave all his real and personal estate to the Defendant *S. Smith* (who was also his heir-at-law, customary heir, and sole executor,) “in hopes

[1] The general rule in Equity is, that a mortgagor in possession has the right to cut timber, and a Court of Equity will not interfere to restrain him in the exercise of that right, until it is made to appear to the court that he is cutting to an extent calculated to render the land an incompetent security for the amount due upon the mortgage. *Brady v. Waldrons*, 2 Johns. Ch. R. 148 ; *Hampton v. Hodges*, 8 Vesey R. 105 ; *Wright v. Atkins*, 1 Ves. & Beav. 314 ; *Farrant v. Lovell*, 3 Atk. 723 ; *Scott v. Wharleton*, 2 Hen. & Mumf. 25 ; *Van Wyck v. Alliger*, 6 Barb. Sup. Ct. R. 511 ; 2 Story's Equity, p. 246 § 915.

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that he might be able to pay his (the testator's) just debts, and find a surplus for his trouble." *J. Reid* devised his legal interest in the mortgaged premises to the Plaintiffs, and appointed them his executors. The Plaintiffs, by their bill, charged, that the mortgaged premises were a "scanty security" for the principal and interest due, and that the Plaintiffs were entitled and claimed to be specialty creditors upon the general estate of the mortgagor for the deficiency; and that, to ascertain the same, the mortgaged premises ought to be sold. The bill prayed an account of the mortgage debt,—a sale accordingly,—and payment out of the proceeds; and, if the same were insufficient, that the Plaintiffs might be declared to be specialty creditors upon the estate for the deficiency: that, if necessary, the suit might be taken as being on behalf of the Plaintiffs, and all other the unsatisfied creditors of *W. Smith*, and the personal and real estate duly administered and applied.

After appearance, and before answer, the Plaintiffs filed their supplemental bill, stating that, since the original bill was filed, the Defendant had felled, and was proceeding to fell and carry away large numbers of timber and timber-like trees, which were growing on the mortgaged premises,—that many of such trees were "lying upon the lands, and had been advertised [*240] for sale: and praying an account of the trees felled, and of the monies produced by the sale, and an injunction to restrain the felling and sale of trees from the mortgaged premises.

The Plaintiffs moved for the injunction, according to the prayer.

Mr. *T. W. G. Daniel*, for the motion, cited *Daniel v. Skipwith* (a); *Hippesley v. Spencer* (b); *Farrant v. Lovel* (c); *Hampton v. Hodges* (d); *Cox v. Goodfellow* (e).

Mr. *James*, for the Defendant, argued that the case was not brought within the authority of *Hippesley v. Spencer*, inasmuch as there was no allegation in the bill, and no proof on the affidavit of any deficiency in the security. But the suit was so framed, that

(a) 2 Bro. C. C. 155.

(b) 5 Madd. 422.

(c) 3 Atk. 723.

(d) 8 Ves. 105.

(e) *Id.* 105. a. (n); October, 1820.

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the Plaintiffs could not have the relief upon it which they sought. They might have sued as mortgagees, and prayed a foreclosure, when they would have had all the rights of an ordinary mortgagee, whatever those rights might be,—or they might have sued as general specialty creditors, when, if they could have shewn the Court that there was a danger of misapplication of the estate by the executor, they might perhaps have obtained an injunction. But they cannot mix up the characters of mortgagee and general creditor, and thereupon have relief compounded of the rights of both. In

Greenwood v. Taylor (a), it was held, that the creditor [*241] was not *entitled to his remedy at the same time in both characters, and that decision was not overruled in *Mason v. Bogg* (b). *Burney v. Morgan* (c). The Plaintiffs, moreover,

(a) 1 R. & Myl. 185.

(b) 2 Myl. & Cr. 450.

(c) 1 S. & St. 358, 362. See *Harris v. Harris*, 3 Atk. 722; per Sir L. Shadwell, 5 Sim. 137; *White v. Hillacre*, 3 Y. & Coll. 597; *Seton on Decrees*, p. 134. The same point was discussed in a late case, before this branch of the Court, where the bill was brought by the executors of a simple-contract creditor, on behalf of themselves and all other creditors of *J. Firth*, deceased, against his sons (one being his heir-at-law), who were in possession of real estate, the title-deeds of which *Firth* had deposited with the plaintiffs' testator as a security for the same debt. The bill stated the deposit by way of equitable mortgage, and that there was no personal representative of *Firth* living, and prayed an account of the debt due to the plaintiffs, and all the other unsatisfied creditors of *Firth*,—a sale of the real estate in question, and payment of the proceeds to the plaintiffs towards satisfaction of the debt,—and, if necessary, a sale of all other the freehold estate of *Firth*, and the application of the produce in payment of the residue owing to the plaintiffs, and what should be due to the other unsatisfied creditors. The defendants, by their answer, objected that the plaintiffs could not at once sue as general creditors, and as equitable mortgagees,—that the personal estate ought to be first applied; that a personal representative of *Firth* was a necessary party, and that the debt was barred by the statute of Limitations.

Mr. Sharpe, Mr. Koe, and Mr. Rogers, for the plaintiffs, waived all claim to relief in the suit as general creditors, and asked for a mortgagee's decree.

Mr. Girdlestone and Mr. Hislop Clarke contended that the frame of the suit was irregular, and could not be corrected by the waiver in this stage of the cause, and that the bill ought therefore to be dismissed. They cited the above authorities.

THE VICE-CHANCELLOR said there was no doubt the Court might make the decree in the usual form in the suit of an equitable mortgagee, and directed the same accordingly GREENWOOD v. FIRTH, 7th June, 1842.

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were not in a situation entitling them to relief in equity : for, having the legal estate, they could at any time bring ejectment,

Mr. *W. T. S. Davis*, in reply.

A mortgagee, if he sues in that character only, and [*242] prays a foreclosure, cannot then combine with it his claim as a general creditor ;[1] but, if, instead of asking the relief which is peculiar to a mortgagee, namely, foreclosure,—he sues as a creditor, he may then, in the same suit, avail himself of the benefit of his mortgage security. The Plaintiffs, in this case, have taken the latter course : they sue as creditors, but offer, at the same time, upon payment of the debt, whether out of that particular estate,—to give up that security ; *Mason v. Bogg* (a) ; *Parker v. Housefield* (b) *Brocklehurst v. Jessop* (c). The filing of the original bill, by the Plaintiffs, had the effect of constituting the Defendant a trustee of the whole real estate of the testator for the incumbrancers, and he could not, during the *lis pendens*, be permitted to alien any part of that estate.

VICE-CHANCELLOR :—

It is now an established rule, that if the security of the mortgagee is insufficient, and the Court is satisfied of that fact, the mortgagee will not be allowed to do that which would directly impair the security,—cut timber upon the mortgaged premises. It has been argued, that, if the bill be for a foreclosure, when the mortgagee seeks to take the whole estate, the Court will not prevent him, pending that suit, from cutting timber or receiving rents, or doing any other act incident to the ownership ; but that, if the plaintiff sued as a general creditor, the Court would give him the relief by injunction. That however is not the distinction. The rule would be rather the other way. The plaintiff, in a foreclosure suit, asks nothing more *than the estate, whilst the plaintiff, in [*243] creditors' suit, seeks the application, not only of the mortgaged estate, but, if necessary, of the general estate also, in pay-

[1] See *Skey v. Bennett*, 2 Y. & C. 406.

(b) 2 Myl. & K. 419.

(a) *Ubi supra*.

(c) 7 Sim. 442.

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ment of his debt. It is very difficult to suppose that a mere creditor can have any such right as the argument assumes. On what principle is the executor and trustee of real estate to be restrained at the suit of a general creditor from acting according to his judgment in the management of the property.

I think the allegation in the bill, that the mortgaged premises are a scanty security for the debt, is a sufficient foundation for admitting evidence of the value of the estate.

VICE-CHANCELLOR:—

The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the Court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this Court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be 1000*l.*, and the property to be worth 1000*l.*, that is, in one sense, a sufficient security; but no mortgagee, who is well advised, would lend his money, unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which, are subject to many casualties to which land is not liable, the mortgagee would, probably, require more. It is

[*244] rather a question of prudence than of actual value. "I think the question which must be tried is whether the property the mortgagee takes as a security, is sufficient in this sense,—that the security is worth so much more than the money advanced,—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question, whether the Court should permit the mortgagor to cut the timber. The supplemental bill, which states the circumstances with respect

1843.—Duke of Beaufort v. Taylor.

to the timber, and prays the injunction, contains no case with reference to the insufficiency of value, nor does the Plaintiff, by his affidavit, make any such case. The bill and affidavit appear to proceed on the supposition that the mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shewn, I am not told the quantity of the land, or the rental; nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the Defendant's affidavits, that he did not cut any of the trees with the intention of injuring the estate, but on the contrary, he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious, that the Defendant is using language, of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

"Let the motion stand over, with liberty to apply. If [*245] the Defendant proceeds to cut more timber, the Plaintiff can renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.

DUKE OF BEAUFORT v. TAYLOR.

1843 : 11th January.

Delay in moving for production of documents until after the Defendant's witnesses are examined, and the exhibits marked, whereby the plaintiff may ascertain which are the Defendant's exhibits, is no objection to the order being made.

MR. CAMPBELL moved for the production of documents admitted, by the answer, to be in the Defendant's possession.

 1843.—*Samuel v. Jones.*

Mr. *Parry*, for the Defendant, said that the motion ought to have been made earlier. The Defendant's witnesses had now been examined, and many of the documents marked as exhibits; and the Plaintiff by inspecting them, would acquire the undue advantage of knowing what documents were intended to be produced on behalf of the Defendant at the hearing.

THE VICE CHANCELLOR made the order for production.

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*SAMUEL v. JONES.

1843: 14th and 30th January.

In an administration or creditors' suit against an executor becoming bankrupt or insolvent, and who is, at the same time, indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency will be set off against his debt; and the costs of the same executor incurred in the proper performance of the duties of his trust, after his bankruptcy or insolvency, will be allowed out of the estate.

AN administration suit.—The bill was filed in January, 1833; and, on the 7th of February, the Defendant *Lloyd*, one of the executors, became bankrupt. On the 14th of May, he obtained his certificate; and, in June, he put in his answer in this cause. The Defendant *Jones*, the other executor, became bankrupt in February, 1834; and afterwards obtained his certificate. The decree in 1836 directed the costs of all parties to be taxed as between solicitor and client, and reserved the payment of the Defendants' costs, and the further directions and subsequent costs. The executors, *Jones* and *Lloyd*, were found debtors to the estate in the amount of upwards of 1000*l.* each. On further directions,

Mr. *Wray*, for the executors, submitted, that, notwithstanding they had been defaulters to the estate, they were entitled to receive their costs as executors, incurred subsequently to their bankruptcy. The executors' costs before the bankruptcy must, there was no

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doubt, be set off against the balance owing by the executors to the estate; but that balance, as a debt, was extinguished by the bankruptcy; and afterwards there was nothing against which their costs could be set off, and no ground for requiring them to act as trustees at their own expense. He referred to the case of *Gibbons v. Hawley* (a).

*Mr. *Koe*, for the Plaintiffs, said, that the consent of [*247] the Plaintiff in *Gibbons v. Hawley*, rendered that case wholly inapplicable as an authority for the present, in which the Plaintiff did not consent: *Harmer v. Harris* (b); *Ex parte Rhodes* (c); *Honipson v. Baandwood* (d).

VICE-CHANCELLOR:—

I think that an executor, although a defaulter to the estate

(a) A creditor's suit against the administratrix, who had carried on the business of the intestate, her husband, after his death, and had become indebted to his estate. After the institution of the suit, the administratrix took the benefit of the Insolvent Act. The decree, on further directions, on the 10th of May, 1832, ordered that her costs should be deducted from the sum of 773*l.* 8*s.* 9*d.*, found to be due from her to the testator's estate; and, if the said costs should exceed the amount of the said debt, that the receiver should pay the excess thereof out of the monies which might come to his hands; and, if such costs should fall short of the amount of such debt, it appearing that the said administratrix had taken the benefit of the Act for the Relief of Insolvent Debtors,—that the Master should inquire, and state to the Court, whether it was for the benefit of the said creditors, that any and what steps should be taken for obtaining of the said debt over the said costs, or of any dividend on such excess. The cause came on again for further directions on the 18th of June, 1839, and the decree then made contains the following direction:—"And, inasmuch as the Defendant became a debtor to the estate of the testator, and was discharged by virtue of the acts in force for Relief of Insolvent Debtors in respect of the amount of her default, and inasmuch as the said Defendant has since, by her solicitor, Mr. *T. Smith*, greatly facilitated the realizing of the assets of the said testator, her husband, and rendered her aid and assistance to the said Plaintiff in prosecuting this suit, and the various proceedings thereunder; and the said Defendant having applied to have costs allowed to her subsequent to the order made on further directions on the 10th of May, 1832, and to her said default, and the said Plaintiff not objecting thereto: It is ordered, that the costs of the Plaintiff and Defendant, subsequent to the order on further directions, be taxed by the said Master between solicitor and client, and paid as hereafter mentioned." *Gibbons v. Hawley*, Rolls, 10th May, 1832; 13th June, 1839.

(b) 1 Russ. 155.

(c) 15 Ves. 539.

(d) 1 Madd. 392.

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[*248] at the time of his bankruptcy, yet properly *conducting himself in his character of executor after the bankruptcy, is entitled to his subsequent costs, like any other executor. A different rule would be harsh. Suppose the case of an executor, who has had the misfortune to be made bankrupt, and who is a debtor to the estate of his testator in a small sum, whilst the chief part of the estate has been got in and secured by his diligence: is a party in such a situation not to have his costs as executor until after the whole of his debt at the time of his bankruptcy shall have been repaid? The bankruptcy is the statutory mode by which, in such a case, the debt is discharged. In other respects, the bankruptcy does not affect the trust character. I shall, therefore, direct the costs of the executors from the time of their bankruptcy to be taxed. No case of misconduct or of unnecessary litigation has been shewn,—but if, on taxing the costs, it should appear that any unnecessary expenses have been incurred, the parties will not be precluded from bringing forward their objections to such charges.

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*WEST v. REID.

1843: 16th and 17th Jan. 11th Feb.

In 1816, D. assigned a policy of insurance on his life to a trustee to secure a sum of money owing to W.; and soon afterwards, the solicitor of W. caused a memorandum to be entered in the office of the Insurance Company, directing that all letters were to be sent to such solicitor, and the premiums were thenceforth paid by W., through the hands of such solicitor; but the Insurance Company were not informed on whose behalf the solicitor acted. In 1826, D. became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by W., through his solicitor, during his life, and by the executors of W., through their bankers, after his death. D. died in 1839.

Held, that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the insurance office of the assignment of the policy to take it out of such order and disposition.

That the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy.

That the executors of W. had a lien on the policy for the amount of the premiums which had been paid by W., and his estate, and the interest thereon; and that

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they were entitled to payment of the amount thereof out of the monies payable under the policy.

Negligence, as applied to cases of constructive notice, supposes the disregard of a fact known to the purchaser, which indicated the existence of the fact, the knowledge of which the Court imputes to him; and such negligence may, without a fraudulent motive, be so gross as to justify the charge of constructive notice. *Semble*.

A purchaser may be presumed to have investigated every instrument, which directly or inferentially forms a link in the title to the property, but not instruments which are neither directly nor presumptively connected with it, and may only by possibility affect it. *Semble*.

By a policy of insurance, bearing date the 16th of August, 1813, the Defendant *Reid*, and two other directors of the Rock Life Assurance Company, in consideration of the annual premium of 95*l.* 18*s.* 2*d.*, covenanted to pay to the executors, administrators, or assigns of *James Daniell*, three months after his decease, the sum of 2,500*l.*, and any bonuses which might be allotted thereto. On the 23rd of February, 1816, *James Daniell* assigned his interest in several funds and securities, including the policy of assurance, to Mr. *Wimburn* (of the firm of *Collett & Wimburn*, solicitors), in trust to secure 5,000*l.* and interest lent to *Daniell* by one *Woodroffe*; and by the same assignment, the policy was at the same time delivered to Mr. *Wimburn*, and thenceforward remained in his possession. On the 17th of May, 1816, the interest of *Woodroffe* in the securities comprised in the indenture of the 23rd of February preceding, including his interest in the policy, was *as- [*250] signed to *James West*, for whom Mr. *Wimburn* afterwards remained the trustee.

It appeared that, in the year, 1816, Mr. *Collett* (the partner of Mr. *Wimburn*) made some communication to the Rock Life Assurance Company, the only information given respecting the particulars or contents of which was contained in a memorandum entered by an officer of the Company, dated the 23rd of July, 1816, in the margin of the declaration made by *James Daniell* at the time of making the insurance,—in the following words:—"Letters to *Collett & Wimburn*, Chancery-lane, by Mr. *Collett's* order." From the time that *James West* became interested under the assignment of the 17th of

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May, 1816, until his death, the annual premiums were paid by him through the hands of his solicitors, Messrs. *Collett & Wimburn*.

On the 8rd of January, 1826, *James Daniell* became bankrupt, and *Barnes* and *Palmer* were appointed his assignees. *Daniell* informed his assignees of the interest of *West* in the policy, and a correspondence on the subject took place soon afterwards between the solicitors of *West* and the solicitors of the assignees, in which it was proposed, and appeared to be agreed between them, that the better course was to sell the policy and apply the proceeds towards the discharge of the debt due to *West*. The policy was at this time valued by the Rock Life Assurance Company at the sum of 875*l.* At the time of the bankruptcy the sum due to *West* was 910*l.* 12*s.* 7*d.* for principal and interest on the original debt,—575*l.* 9*s.* for premiums paid on the policy, and 82*l.* 19*s.* 3*d.* for interest thereon. On the 4th of August, 1827, the solicitors of *West* wrote to the solicitors of the assignees, recommending that the sale should be carried into effect, and also stating that the annual premium was on the point of becoming due, and offering to pay it, in order to keep the policy on foot, if authorized to do so by the assignees. *Barnes* and *Palmer* were afterwards removed from being assignees of the estate of *Daniell*, and Defendant *Solarte* and others substituted in their place, by whom new solicitors were appointed, who refused to interfere with respect to the sale, or payment of the premiums. *James West* died in November, 1829. From the death of *West* the annual premiums on the policy were paid by the Plaintiffs, his executors, through their bankers. On the 25th of December, 1839, *James Daniell* died. The sum at this time due to the executors of *James West* in respect of the original debt, premiums, and interest, amounted to 4,049*l.* 12*s.* 9*d.* The sum payable on the policy was 3,667*l.* 10*s.*

The bill was filed by the executors of *West*, and Mr. *Wimburn*, their trustee, against *J. Reid*, the director of the Rock Life Assurance Company,—the surviving assignees,—and the executor of *Daniell*, praying a declaration that the Plaintiffs were entitled to the policy of insurance, and the benefit thereof, and to the monies to be received thereby; and that the Rock Life Assurance Company might be decreed to pay to the Plaintiffs, the executors, the said sum of

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3,667l. 10s., or such other sum as was then due and owing from the Company on account of the policy; or if, under the circumstances, the assignees of the estate and effects of *James Daniell* had a right to redeem the policy, then that the Plaintiffs, the executors, might be declared to have a lien thereon for what was due to the estate of *West*, as well for principal and interest on the bonds therein mentioned, as for the amount of premiums paid by *West* or his executors, together with interest on such premiums, according to the indentures of the 23rd of February and the 17th May, 1816; and in the latter case praying an account of what was due to the [*252] Plaintiffs for principal and interest upon the security of the said policy of insurance, and that the said assignees might be decreed to pay to the Plaintiffs what should appear to be due to them on the said account, together with the costs of the suit; or in default thereof, that they might be foreclosed of the equity of redemption of the said policy.

The Rock Life Assurance Company paid into Court the sum of 3667l. 10s., due upon the policy, which was the only property comprised in the indenture of the 23rd of February and 17th of May, 1816, which became available for the payment of the Plaintiffs' debt.

The assignees of *James Daniell* under his bankruptcy claimed the monies arising from the policy, on the ground that the policy was in the order and disposition of the bankrupt; but it was admitted at the bar, on the part of the assignees, that the Plaintiffs were entitled to a lien on the policy for the amount of the premiums paid on account of *West* and of his estate, and the interest thereupon.

Mr. Boteler and Mr. Walpole, for the Plaintiffs, argued,—first, that the policy was not in the order or disposition of *Daniell* at the time of his bankruptcy, within the meaning of the statute (a): *Ryall v. Rowles* (b); *Ex parte Richardson* (c); *Falkener v. Case* (d); *Ex parte Monro* (e); *Ex parte Colwill* (g); *Williams v. Thorp*

(a) 6 Geo. 4, c. 16, s. 72.

(b) 1 Ves. 349, 375; *S. C.* (nom. *Ryall v. Rolle*), 1 Atk. 165.

(c) Buck, 480.

(d) Cited 2 T. R. 491.

(e) Buck, 800.

(g) Mont. 110; *S. C.* 2 Sim. 570.

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(a); *Ex parte Smith, re Styant* (b); *Ex parte Pooley* (c); *Ex parte Heathcote* (d); *Ex parte Cooper* (e); *In re Hennessy* (g); *Ex parte Waithman* (h); *Edwards v. Scott* (i). Secondly, that if the policy would have been within the order and disposition of the bankrupt, under the act, the notice given to the office, and the payment of the premiums by West and the Plaintiffs, had taken it out of such order and disposition: *Duncan v. Chamberlayne* (k); *Ex parte Stright* (l); *Smith v. Smith* (m); *Ex parte Stevens* (n); *Hiern v. Mill* (o); *Tibbitts v. George* (p); *Jones v. Smith* (q); *Stiles v. Cowper* (r); *Dan v. Spurrier* (s); *Shannon v. Bradstreet* (t). Thirdly, that the conduct of the assignees had in effect amounted to an abandonment of any right which they might have had to the policy by virtue of the statute: they might after their right accrued have taken proceedings at law against *Wimburn* for the recovery of the policy. Fourthly, that the Plaintiffs were at least entitled to the assistance of the Court in the recovery of so much of the monies payable on the policy as should give effect to their lien upon it for the premiums paid by West and his estate, and the interest upon such premiums: *Schondler v. Wace* (u); *Gibson v. Overbury* (v); *Burridge v. Row* (w).

Mr. *Kenyon Parker* and Mr. *Sidebottom*, for the assignees of *Daniell's* estate under his bankruptcy, adverted to the [*254] authorities previously mentioned, supporting their title; and also *Ex parte Carbis* (x), on the point that there was no sufficient notice of the assignment (y).

(a) 2 Sim 257.

(b) 2 M., D. & De G. 213.

(c) C. R., 4th March, 1842.

(d) C. R., 23rd July, 1842.

(e) 2 M., D. & De G. 1.

(g) 2 Drury & War. 555; S. C. 1 Con. & Law. 559.

(h) 4 Dea. & Ch. 412; S. C. 2 Mont. & Ayr. 364.

(i) 1 Man. & Grang. 962.

(k) 11 Sim. 123.

(l) 2 Dea. & Ch. 314.

(m) 2 Cro. & Mees. 231.

(n) 4 Dea. & Ch. 117.

(o) 13 Ves. 114.

(p) 5 Ad. & El. 107.

(q) Ante, Vol. 1, p. 43.

(r) 3 Atk. 692.

(s) 7 Ves. 231.

(t) 1 Sch. & Lef. 52.

(u) 1 Camp. 487.

(v) 7 Mees. & Wels. 555.

(w) 1 Y. & Coll. C. C. 183.

(x) 4 Dea. & Ch. 354.

(y) The arguments in support of the claim of the assignees sufficiently appear in the judgment.

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Mr. Hardy, for the executors of *Daniell*.

VICE-CHANCELLOR:—

It being now admitted on the part of the assignees of *Daniell* that they cannot resist the claim of the Plaintiffs to a lien on the policy in respect of the premiums which have been paid by *West* and his executors, the question is, whether I can, upon any of the other grounds relied upon by the Plaintiffs give them a better decree than that which the assignees are willing that they should take.

Upon the first point, whether the policy of assurance was or not within the clause of the Bankrupt Act, which, in case of bankruptcy, gives to reputed ownership the effect of actual ownership, I shall (as I intimated during the argument) follow the example set me by the Chief Judge of the Court of Review, in the late case *Ex parte Pott, re Daintry and Ryle* (a). If the cases which have decided that a policy of assurance is a chattel, within the meaning of the clause of the Bankrupt Act, relating to order and disposition, are to be disturbed, the decision which is to have that effect should come from the *Lord Chancellor*. I shall trust myself with this observation only, that the reasoning upon which the cases have proceeded appears to me to be logically correct, and that I must not be understood *from anything which fell from me during the argu- [*255] ment, to have intimated an opinion that the existing decisions will be or ought to be disturbed.

The second question is, whether enough was done by *West* or his executors to take the policy in this case out of the order and disposition of the bankrupt.

The question of reputed ownership is always a question of fact: *Edwards v. Scott* (b). In the particular case of the assignment of a debt or policy of assurance, notice to the debtor in the one case, and to the insurers in the other, has generally been considered the test by which the question of change of reputed ownership of the debt, or money secured by the policy, is to be determined; because it is by such notice that the debtor, or Insurance Company, would be pre-

(c) C. R., 10th January, 1843.

(a) 1 Mang. & Grang. 962.

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vented from paying the money to any other than the party claiming, as in this case, by assignment. In the absence of some modern authorities, which are entitled to the greatest respect, I might, perhaps, have had difficulty in coming to the conclusion that the want of express notice was in all cases material, and that the possession (by an assignee of a chose in action) of the instrument securing or evidencing the debt, and the practice of each particular assurance office, might not be sufficient in deciding the question of reputed ownership of a debt in a court of equity: *Ex parte Byas* (a); *Unwin v. Grosvenor* (b); *Falkener v. Case* (c); *Ex parte Richardson* (d); *Ex parte Kensington* (e); *Bozon v. Bolland*, cited in *Ex parte Tennyson* (g); *Greening v. Clark* (h);¹ *Ridout v. [256] Lloyd* (i); *Ex parte Cooper* (k); *Ex parte Smith, re Styne* (l). But in *Gibson v. Overbury* (m), the Court of Exchequer held, that the policy of assurance itself might not be in the order and disposition of the bankrupt, consistently with the equitable doctrine that the money due upon the policy remained in his order and disposition. And in *Ex parte Morris* (n), *Williams v. Thorp* (o), *Ex parte Colvill* (p), and *Ex parte Tennyson*, it was held, that the policy being delivered to and held by the assignee for value, did not alter the case.

The practice of the particular offices has not been admitted as sufficient, unless notice of the assignment was given; *Williams v. Thorp*; and the necessity of giving notice has been tacitly admitted in all the modern cases by the discussions which have arisen respecting the nature of the notice required. In *Buck v. Lee* (q), the same proposition is recognized. I cannot, therefore, consider myself at liberty, in this particular case, to do more than inquire, whether in fact the office had such a notice of assignment as would have sub-

(a) 1 Atk. 124.

(c) 1 Bro. C. C. 125; S. C. reported 2 T. R. 490.

(e) 2 Rose, 138.

(h) 4 B. & C. 316.

(k) 2 M., D. & De G. 1.

(m) 7 Mees. & Wels. 555.

(o) 2 Sim. 257.

(p) Id. 570, n.; S. C. Mont. 110.

(b) West, 647.

(d) Buck. 480.

(g) Mont. & Bl. 74.

(i) Mont. 103.

(l) Id. 213, 219.

(n) Buck. 300.

(q) 1 Ad. & El. 804.

1843.—West v. Reid.

jected them to the liability to pay the amount of the policy a second time, if they had paid it to Mr. *Daniell's* assignees in bankruptcy. Now the fact that the premiums were paid by Messrs. *Wimburn & Collett* out of the funds of *West* during his life, and that they were paid by the bankers of *West's* executors, after his death, cannot per se make any difference. The office had a right to the premiums, and until the person paying them, or some other, gave notice that the original position of the parties was altered, the office would be justified in considering the premiums as paid [*257] under and in conformity with the original contract. It is not suggested that there was anything in the mere mode of paying the premiums from which the office had notice of any change in the position of the parties; and in answer to a question I put upon this point, it was admitted that there was no alteration; that the premiums were paid, and the receipts given as from *Daniell*.

The only remaining fact upon which notice to the office could be inferred was the memorandum entered in the margin of Mr. *Daniell's* declaration (a).

Upon this part of the Plaintiffs' case, I was referred to *Hiern v. Mill* (b), *Tibbitts v. George* (c), and to my own judgment in *Jones v. Smith* (d). In applying (as I think I am bound to apply) to the case now before me the principle upon which I acted in *Jones v. Smith*, I shall take the opportunity of repudiating a conclusion which I have been told has been drawn from the language I used in that case, but which I think the language does not warrant, unless in a single expression, corrected in that respect as well by the immediate context as by the other parts of the judgment. I have been told that, according to the language I made use of in that case, the grossest negligence would in no case justify the Court in charging a party with constructive notice, unless the negligence proceeded from a fraudulent motive existing in the mind of the party at the time. Nothing, certainly, would have been further from my intention, than to say any thing which should lead to the conclusion that there

(a) *Supra*, p. 250.

(c) 5 Ad. & El. 107.

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(b) 13 Ves. 114.

(d) *Ante*, vol. 1, p. 43.

1843.—*West v. Reed.*

may not be a degree of negligence so gross (*crassa negligentia*) that a court of justice may treat it as evidence of fraud— [*258] impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent,—a meaning which, I should have thought, had been sufficiently conveyed by my expression, that negligence might be evidence of fraud, but that it was *not the same* thing. In *Jones v. Smith*, the mortgagee knew that the mortgagor was married, and, therefore, knew that he *might* have made a settlement, and *might* have included in such settlement the property proposed to be included in the mortgage. But there was nothing in the fact of marriage which raised a legal presumption or inference that it was settled, and, therefore, nothing upon which to found a charge of negligence as distinguished from mere want of extreme caution in the mortgagee. The mortgagee was credibly informed both by *Jones* (the mortgagor) and his wife,—one of whom (the wife) at all events, according to her evidence in the cause, believed she was speaking the truth,—that the property about which he was treating was not comprised in their marriage settlement. He was informed, that the wife's property was settled, and that the husband made no settlement; and a reasonable excuse was made for not producing that deed. Believing what was told him, he became mortgagee of the property, and got in the legal estate. There was no pretence, in that case for imputing actual fraud to the purchaser, nor was there a single fact or circumstance in the case raising, or tending to raise, an inference, or create a suspicion that the husband's property was in settlement.

Having satisfied myself that *Smith* had acted bona fide, and that he had not notice of any fact raising a presumption, or creating a suspicion, that the husband's property was in settlement, I could not possibly hold that he had notice of that fact. A decision to that effect would have been merely arbitrary, and inconsistent [*259] with the facts of the case. Extreme caution, no doubt, might have led *Smith* to inquire after a mere possibility, the existence of which he had no ground to surmise. But the omission to exercise such caution is not negligence in the legal sense

1843.—*West v. Road.*

of the term, nor, indeed, in any sense. Negligence, as I understand the term, supposes a disregard of some fact known to a purchaser, which at least indicated the existence of that fact, notice of which the Court imputes to the purchaser.

I do not deny that difficulty may sometimes arise in drawing the line between the degree of negligence, which shall be sufficient to charge a purchaser, and that mere want of extreme caution which, in the absence of fraud, will excuse him. But the distinction is founded in principle,—and the difficulty is one with which (upon the very question of gross negligence) courts of justice are in the daily habit of grappling; and the difficulty in principle is not distinguishable from that which occurs in every other case in which antagonist principles come into immediate conflict with each other.

The distinction, which is taken in terms by Sir *Edward Sugden* (a), is fully borne out,—by the cases which decide that a person purchasing without obtaining the title-deeds, is not affected by notice of an equitable mortgage: *Plumb v. Fluit* (b); *Bickenell v. Evans* (c),—by Lord *Thurlow's* judgment in *Cothay v. Sydenham* (d),—by a judgment of Lord *Hardwicke*, and other cases referred to in the judgment in *Jones v. Smith*. If that distinction be not admitted in a case like *Jones v. Smith*, the unavoidable consequence must be, that a man, who mortgages a [*260] fraction of his estate will thereby throw a cloud upon the title to the rest of his estate; and a devise of a single acre of land by a will, which does nothing more, will throw a cloud upon the title of an heir-at-law to his descended estates; for, it is clear, that neither the mortgagor in the one case, nor the heir in the other, can command the production of the mortgage-deed or will; and it is equally clear, that nothing but the production of the original itself would be sufficient, if a representation such as *Smith* relied upon be not sufficient. Similar observations would apply to a codicil partially revoking a will; and to every deed executed after the date of a will.

(a) *Tr. Vend. & Pur.*, vol. 3, p. 472, ed. 10.

(b) 2 Anst. 432.

(c) 6 Ves. 174.

(d) 2 Bro. C. C. 391.

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In short, let the doctrine of constructive notice be extended to all cases (it is in fact more confined: *Plumb v. Fluit*, *Bichnell v. Evans*, *Cothay v. Sydenham*, and other cases,—but) let it be extended to all cases in which the purchaser has notice that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limits which that statement of the rule imposes—once admit that a purchaser is to be affected with constructive notice of the contents of instruments not necessary to, nor presumptively connected with, the title, only because, by possibility, they *may* affect it (for that may be predicated of almost any instrument); and it is impossible, in sound reasoning, to stop short of the conclusion, that every purchaser is affected with constructive notice of the contents of every instrument of the mere existence of which he has notice. A purchaser *must* be presumed to investigate the title of the property he purchases, and may, therefore, be presumed to have examined every instrument forming a link, directly or by inference, in that title; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly nor presumptively connected with the title, only because they *may* by possibility affect it (a).

The same principle must govern my judgment in the case now before me. Had the office, before the bankruptcy, notice of any fact which created a change of *Daniell's* interest in the policy? If *Collett* and *Wimburn* required the letters to be addressed to them as Mr. *Daniell's* solicitors, they would naturally have given it in the simple form in which the office received it. If they gave it not as Mr. *Daniell's* solicitors, but as the solicitors of a party claiming a new interest, the office had a right to expect that the notice they received should have been more explanatory. The circumstance that one member of a firm of solicitors request that all letters re-

(a) See *Jackson v. Rowe*, 2 Sim. & Stu. 472; *Hodgson v. Dean*, 2 Sim. & Stu. 221. And see, also, *Jones v. Smith* (per Lord Chancellor, on appeal), Tur. & Ph. Rep. (not pub.) See *Jones v. Smith* 1 Phil. 243. and note 4, page 248, and same case 1 Hare p. 43.

1848.—*West v. Reid.*

specting the policy effected by *Daniell* may be sent to the firm of which that solicitor is a member, does not raise any inference that *Daniell's* interest in the policy had undergone any change. I do not deny that extreme caution might have led the office to inquire whose solicitors *Wimburn* and *Collett* were; but in the absence of actual fraud, I could not hold that this was a case of that gross negligence to which courts of justice impute fraud, and visit with the consequences of fraud. I am not considering a case which has happened, but I am speculatively to determine whether the insurance office, having no notice of *West's* interest except that, if any, which is to be inferred from the note in the margin of the declaration, would have been liable to the Plaintiffs for the amount of the policy, if they had paid it to the assignees of *Daniell's*

*under his bankruptcy. I feel bound to decide that they [*262] would not have been so liable. Upon that evidence alone I should say, as between these parties only, that the negligence was in those who omitted to give the office actual notice of *West's* claim, and not in the office, who, receiving from one of a firm of solicitors a communication which was perfectly consistent with the original position of the parties, did not infer that any change had taken place. Whatever I might have thought, if the question were untouched by decision, yet finding it decided that parting with the policy will not alone take out of the order and disposition of the bankrupt, I cannot hold that the case is altered by a communication of the character I have referred to,—a communication in every respect consistent with the original right.

Upon the third point,—the suggested abandonment by the assignees,—I am also of opinion against the Plaintiffs.

It does not follow, that, because the assignees may now have a right to demand from the office the money due upon the policy, they could have recovered the policy in trover during *Daniell's* life; and inasmuch as the right of the creditors was fixed by the bankruptcy itself, the correspondence can have no effect except as evidence of a subsequent contract, or intentional abandonment of right. No such contract is suggested, nor can it be said that there was any intentional abandonment, adverting to the knowledge of their interests

 1843.—*Houghton v. Reynolds*.

which the parties had. There is no consideration between *West* and his estate on the one hand, and the assignees under the bankruptcy on the other, entitling the former to claim the policy adversely.

I must therefore declare that *West's* estate is entitled [*263] *to be repaid out of the fund the amount of the premiums paid by *West*, or by his executors, together with interest on such payments from the times at which they were respectively made. The Plaintiffs are entitled to the costs of so much of the suit as was directed to that part of the case on which they have been successful. The right to the premiums was given up at the bar, yet it was not given up on the pleadings, nor indeed was it at first given up at the bar. There was therefore an absolute necessity for coming into Court to establish that claim. As to the rest of the costs of the suit, I at first thought that I ought to make the Plaintiffs pay them; but advertng to the recent decisions by Sir *John Cross*, I think any party was justified in taking the opinion of the Court upon the question, whether the former decisions in *Williams v. Thorp*, and *Ex parte Colville*, and other cases, are to be taken as the rule of the Court or not. On that part of the case, therefore, I think there should be no costs. The balance of the money in Court will be paid to the assignees; and the costs of *Dawson*, the executor of *Daniell*, who appears to have been unnecessarily made a party, must be paid by the Plaintiffs.

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HOUGHTON v. REYNOLDS.

1843: 14th January.

An averment in a bill to restrain the setting up of outstanding terms in ejectment,—that H. being or claiming to be entitled to the premises, devised to the Plaintiff, and positively averring the title of the plaintiff thereto, accompanied by statements showing that his claim was founded upon the devise,—held to be sufficiently certain upon general demurrer.

There is no rule of pleading which requires that the facts creating the title of the Plaintiff to relief must appear on the stating part or before the charging part of the bill; but an allegation that the Defendant pretends, &c., and a general charge of the contrary of such pretences, is not an averment of the facts implied in the contrary charge.

 1842.—*Houghton v. Reynolds*.

THE bill stated, that *J. Houghton* "being or claiming to be seised or otherwise well entitled in fee-simple to divers messuages," &c., situated in *Halstead*, in the county of *Essex*, devised all and singular his houses, lands, &c., to his widow, for her life, with remainder to the Plaintiff in fee: that, upon the testator's death, and under and by virtue of his will, the widow entered upon and took possession of the said messuages, &c., so devised to her by the said will: that the widow died, leaving the Plaintiff, who is devisee in remainder in fee-simple of the said messuages, &c., under and by virtue of the said will; and he thereupon became and now is absolutely and indefeasibly intitled to an estate in fee-simple in possession in the said messuages," &c., so devised as aforesaid. That the defendant wrongfully took possession of the said messuages, &c.

The bill charged, that there were several outstanding satisfied terms of years affecting the said messuages, &c., particularly certain terms therein mentioned, which the Defendant had got in, and threatened to set up, to prevent the trial in ejectment of the plaintiff's title to the devised estates. The bill prayed, that the Defendant might be restrained from setting up the terms of years upon the trial of the ejectment.(a)

The Defendant demurred.

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Mr. *Teed* and Mr. *Speed*, for the Defendant, argued that the bill stated only a case in which the Plaintiff might possibly be, and not a case in which he was necessarily entitled to the relief prayed: *Kemp v. Pryor* (b). The averment, that the testator, "being or claiming to be seised or otherwise well entitled" to the premises, devised them, was not an averment of title: *Balls v. Margrave* (c); nor was it sufficient to allege that the party was entitled without deducing his title: *Baker v. Harwood* (d). The demurrer admits only the facts stated, and not the title which is the legal consequence of the facts. The equity of the bill, assuming it to aver a title,

(a) The bill also prayed, that certain deeds might be delivered up as having been obtained from the Plaintiff by fraud. The combination of this relief with the above was made the subject of a demurrer *ore tenus*, for multifariousness, which was also overruled.

(b) 7 Ves. 245.

(c) 3 Beav. 234.

(d) 7 Sim. 373.

1843.—Houghton v. Reynolds.

depends on the existence of outstanding terms intended to be set up by the Defendant: *Stansbury v. Arkwright* (a). But there is no allegation on the *stating* part of the bill of any facts leading to such relief; and the rule is laid down as requiring the equity to appear on the *stating* part: *Flint v. Field* (b): 1 *Dan. Ch. Pr.*, p. 465; *Story, Com. Eq. Pl.*, p. 24.

Mr. *Kenyon Parker* and Mr. *Malins*, for the Plaintiff, argued that, supposing the first averment of the seisin of the testator to be insufficient, yet the defect was cured by the subsequent allegations of the Plaintiff's title under the devise; and that it was sufficient, if the circumstances on which the equity was founded were averred in any part of the bill: they referred to *Mayor &c. of London v. Levy* (c).

[*266] *VICE-CHANCELLOR:—

There must, no doubt, be such certainty in the averment of the title upon which the bill is founded, that the Defendant may be distinctly informed of the nature of the case which he is called upon to meet. This is the principle upon which the insufficiency of ambiguous statements has been put: *East India Company v. Henchman* (d); *Cresset v. Mitton* (e); *Ryves v. Ryves* (g). The case of the *Mayor and Commonalty of London v. Levy* (h) is another case on the same point, although it is no authority in support of the argument for the Plaintiff. The cases of *Jones v. Jones* (i), and *Frietus v. Dos Santos* (k), also support the proposition, that the Plaintiff must distinctly aver his equitable title. In *Walburn v. Ingilby* (l), the demurrer was allowed on the ground that the plaintiff did not specifically state the manner in which his title was derived; and although a doubt may have been expressed of the authority of that case in some respects, yet it has never been doubted that a plaintiff must state his title with sufficient particularity and

(a) 6 Sim. 481.

(c) 8 Ves. 398.

(e) Id. 449.

(h) 8 Ves. 398.

(k) 1 Y. & Jer. 574.

(b) 2 Anst. 543.

(d) 1 Ves. jun. 287.

(g) 3 Ves. 343.

(i) 3 Mer. 161.

(l) 1 Myl. & K. 61.

1843.—Houghton v. Reynolds.

detail to enable the defendant to meet the case upon some definite issue [1].

[1] If the facts stated in the Bill are not sufficient to entitle the complainant to the relief prayed, he cannot resort to the answer of the defendant, the proof taken in the case or to any extraneous matters to supply the defects in the charges of the Bill *West v. Hall*, 3 Har. & John R. 221.

That every bill in chancery must state facts sufficient to entitle the complainant to the relief prayed, or to relief under the general prayer, see *West v. Hall*, 3 Har. & John. 221; *Chalmers v. Chambers*, 6 Har. & John, 29; *Ringgold v. Ringgold*, 1 Har. & Gill. 11. *Lingan v. Henderson*, 1 Bland, 236. *Ealep v. Watkins*, 1 Bland, 486. *Iglehard v. Armiger*, 1 Bland, 519. *Townshend v. Duncan*, 2 Bland, 45. *Binney v. Law*, 2 Bland, 99. *Solman v. Claggett*, 3 Bland, 125.

The stating part of the bill is the most important part. It should contain a narrative of the facts and circumstances which constitute the gravamen of the plaintiff's case, and of the wrongs or grievances of which he complains, and the names of the persons by whom done, and against whom he seeks redress. See *Barton's Suits in Equity*, 27. *Mitford Pl. by Jeremy*, 43. *Colyer's Pl. 9*. *Story's Pl. 27*.

If the plaintiff means to offer evidence of any fact in the progress of the cause, such fact must be distinctly stated in the stating part of the bill, or he will not be permitted to offer or require evidence of such fact. See *Ireham v. Child*, 1 Bro. Ch. R. 94. *Wilkes v. Rogers*, 6 Johns. R. 565. *Gordon v. Gordon*, 3 Swanston, 472. *Sidney v. Sidney*, 3 P. Wms. 276. *Watkins v. Watkins*, 2 Atk. 96. *Whaley v. Norton*, 1 Vern. R. 488. *Clark v. Taunton*, 11 Vesey, 240.

For cases where the bill has been held bad, from the vague and indeterminate manner in which the facts were stated, see *East India Company v. Henchman*, 1 Ves. Jr. 287, 288. *Crepet v. Mitton*, 1 Ves. Jr. 449. S. C. 3 Bro. Ch. R. 481. *Wormald v. De Lisle*, 3 Beavan R. 18. *Ryves v. Ryves*, 3 Ves. 343. *Balls v. Margrave*, 3 Beavan, 284. *Edwards v. Edwards*, Jacob R. 335. *Gell v. Hayward*, 1 Vern. R. 312. *The Mayor of London v. Dey*, 8 Ves. 398, 401. *Jones v. Jones*, 3 Merivale, 160, 172, 173. *Morris v. Morgan*, 10 Sim. 341. *Frietas v. Don Santos*, 1 Young & Jerv. 574. *The Prince of Wales v. The Earl of Liverpool* 1 Swan. 126. *McGregor v. The East India Company*, 2 Sim. 454. *Mendizabel v. Machado*, 1 Sim. 77. *Walbarn v. Ingilby*, 1 Myl. & K. 61. *Hardman v. Ellames*, 5 Sim. 640. *Stanbury v. Arkwright*, 6 Sim. 481. *Munday v. Knight*, 3 Hare, 497. *Griffith v. Ricketta*, 3 Hare, 476. *Darthez v. Clemens*, 6 Beavan, 165. *Arkwright v. Colt*, 2 Young & Col. 4. *Baker v. Harwood*, 7 Sim. 373. *Cruger v. Halliday*, 11 Paige R. 314. *Shepherd v. Morris*, 4 Beavan, 252. See also *Shepard v. Shepard*, 6 Conn. R. 37. *Hobart v. Frisbie*, 5 Conn. R. 592.

In regard to the certainty required in a bill in Equity, the same strictness does not obtain as is required in pleadings at law. Certainty to a common intent is all that is required. The plaintiff should state the right, title or claims of the plaintiff with accuracy and clearness; he should in like manner state the injury, or grievance, of which he complains, and the relief, which he asks of the court. There must be certainty in the averment of the title, upon which the Bill is founded, that the defendant may be dis-

 1843.—*Houghton v. Reynolds*.

The first statement in the bill,—that, being or claiming to be seised or entitled, the testator devised the premises,—can scarcely be said to tender any material issue, and standing alone, might be sufficient. The subsequent allegations, however, distinctly and positively assert the title of Plaintiff to the premises in question; and it cannot, I think, be said, that he loses the benefit of those [*267] distinct and positive statements by *having ambiguously represented the title of his devisor, or stated that title in a doubtful form. I do not see how, in pleading, the averment of title is made better by being carried back a step farther. An abstract is no doubt unsatisfactory, if it commence at a date which is too recent; but an averment in pleading of the title of a party is not made more positive or certain by the statement that his ancestor, or those under whom he claims, were also entitled. The question of the sufficiency of the pleading, in this sense, is a very different question from that of whether the case is so ambiguously stated as only to shew a possible title in the party to the right which he claims, without shewing the nature of his title.

I think the averment of title in the Plaintiff is sufficiently positive to relieve the case from the objection which has been taken; and I also think that the statements, upon the whole, represent distinctly enough, that the claim of the Plaintiff is founded upon the devise, and they, therefore, inform the Defendant of the nature of the case against which he is required to defend himself.

tinctly informed of the nature of the case, which he is called upon to meet. The rule upon this subject will be found succinctly and accurately laid down in the case of *Houghton v. Reynolds*, 2 Hare R. 26*i*. See also *Hood v. Inman*, 4 John. Ch. R. 437 and *East India Company v. Henchman*, 1 Ves. Jr. R. 239, in regard to looseness and prolixity. See also *Wigram v. Discor*, 86. 81, 1st ed. p. 131, 132, 2d ed.

That although a general charge may be insufficient, yet the plaintiff is not bound to set forth all the minute facts, but that on the contrary a general statement of a precise fact is often sufficient, and that the circumstances which go to confirm or establish it need not be minutely charged, but are matters of evidence. See *Chicott v. Lequesne*, 2 Ves. R. 318. *Clark v. Periam*, 2 Atk. 337. *Wigram v. Discor*, 82, 85, 1st ed. *Cozine v. Graham*, 2 Paige Ch. R. 177. *Faulder v. Stuart*, 11 Ves. R. 302. *Colton v. Ross*, 2 Paige Ch. R. 395. *Harrison v. Hogg*, 2 Ves. Jr. R. 328. *Lloyd v. Brewster*, 4 Paige Ch. R. 537.

1843.—Gray v. Garman.

I do not impeach the decision in *Anstruther* (a): but that case is not an authority for the proposition, that a fact introduced by way of a charge in the bill is not as well pleaded as if it were introduced in the shape of what is technically called a statement; it merely decides that an allegation, that the Defendant sets up certain pretences, followed by a charge that the contrary of such pretences is the truth is not of itself an allegation or averment of the facts which make up the counter statement. I have no doubt that such a form of pleading—not specifically averring the facts themselves [*268] would be defective,—but there is no rule that every material fact must precede what is termed the charging part of the bill.

The demurrer must be overruled, but without costs; for the Plaintiff has certainly invited the discussion.

GRAY v. GARMAN.

1843: 26th and 30th January.

Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and, in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parents' place: —*Held*, first, that no brother or sister, who died before the date of the will, was capable of taking under the bequest, and, therefore, the issue of any brother or sister, who was dead before the date of the will, could not take by substitution; secondly, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife; and, thirdly, that the brothers and sisters, who survived the testator, and afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue. See *Gaskell v. Holmes*, 3 Hare, 436. [1]

THE testator, by his will, dated in 1812, gave his real and per.

(a) *Flint v. Field*, ubi sup.

[1] Chancellor Walworth, in the case of *Collin v. Collin*, 1 Barbour Ch. R. 630, which was a case where the testator disposed of his residuary estate as follows: "I give and bequeath all the rest and residue of my personal estate to all my grandchildren, to be distributed among and paid to them, share and share alike, by my executors in manner and form following; to be vested in good securities bearing interest, and to be paid to them severally as they arrive at the age of 21 years in equal shares, estimating the whole amount of such residue of my personal estate at the time of each pay-

 1843.—Gray v. Garman.

sonal estate to his wife for her life, and directing a sale of the real estate, and bequeathing some pecuniary legacies to be paid after her death, he disposed of the residue as follows:—"All the rest, residue, and remainder of my estate and effects I desire may be equally divided between the brothers and sisters of my said wife, *Elizabeth Rockwell*; and, in case any or either of them shall be dead at the time of the decease of my said wife, *Elizabeth Rockwell*, leaving issue, then such issue to stand in the place of their respective parents or parent."

ment, and thus making an equal distribution of the same among such grand-children; and the testator died leaving twenty-three grand-children, seven of whom were born subsequent to the making of the will; and the testator also left five children, who survived him and who were living at the time of the filing the complainant's bill, but none of whom had any children born subsequent to the death of the testator: and whereat the date of the will some of the grand-children were over 21 years of age, and others arrived at that age previous to the death of the testator; Held, 1st, That the proper construction of the residuary clause of the will was, that all the grand-children of the testator who were in esse at the time of his death, or their legal representatives, and no others were entitled to share in the residuary estate.

2d. That in order to limit the bequest, in such a case, to those who answered the description of grand-children of the testator at the time of the making of his will, and to exclude those who answered the description at the time of his death, there must be something in the will itself to show that he meant to confine his bounty to those who were in esse at the date of his will. For the will being ambulatory until his death, the legal presumption is, that he intended to include all who should answer the description at that time.

3d. That as to the shares of the grand-children who were of age at the time of the making of the will, and of those who were of age at the death of the testator, he contemplated the distribution thereof immediately upon his death. And the direction in the will that all of this class shall take equal shares of the residuary estate, necessarily excluded those persons, if any there should be, who were not in esse at the period appointed for the final distribution, viz. the time of the testator's death.

4th. That the general rule is that, in a will of personal estate, the testator is presumed to speak in reference to the time of his death; and not in reference to any previous or subsequent period. A bequest to the children of a testator, as a class, will include all his children in esse, at the death of the testator, including children begotten at such time, though born afterwards.

5th. That it is a general rule, that where an estate is to be distributed among a class at the death of a testator, those who are in esse at that time, and no others, are entitled to share in the distribution. But where the distribution is to be made among a class, at the death of a particular person, or upon a contingency which may happen subsequent to the death of the testator, all who answer the description of the class at the time appointed for the distribution will be entitled to share in the fund.

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The testator died in 1813, and the said *Elizabeth*, his widow, died in August, 1839. There had been fifteen brothers and sisters of *Elizabeth* the wife, of whom seven died in the lifetime of the testator without leaving issue, and one, named *John*, died before the date of the will, leaving six children. Of the seven who survived the testator, two died in the lifetime of the widow with- [*269] out issue, and five survived the widow.

The six children of *John* survived the testator, and three of them died in the lifetime of the widow,—two leaving issue, and one without issue and intestate,—one left *England* in 1828, and was not afterwards heard of,—and two survived the widow, and appeared in the cause.

Mr. Temple, Mr. Teed, Mr. Roupell, Mr. Anderdon, Mr. Chandless, Mr. Bagshawe, Mr. Cooke, and Mr. Glasse, appeared for the various parties interested (a).

They cited the cases which are commented upon in the judgment, and also *Corbyn v. French* (b), *Pearson v. Stephen* (c), and *Woodworth v. Wood* (d).

VICE-CHANCELLOR:—

Two questions have been discussed in this case: first, whether the issue of *John*,—*John* having died before the date of the will,—are entitled to a share in the residue of the testator's estate? and, secondly, whether, of the seven brothers and sisters of the wife who survived the testator, and two who died without issue, in the lifetime of the widow, were entitled to participate in the same residue?

"The answer to the first of these questions must be [*270] found in the words of the will. And, as there clearly is

(a) Many of the claimants were heard by consent, not being parties to the suit, which was brought by a legatee. The Court permitted the questions to be argued, at the request of all the parties, to avoid the expense of another suit.

(b) 4 Ves. 435.

(c) 5 Bl. N. S. 203.

(d) 4 Myl. & Cr. 641.

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not in this will (as the Court thought there was in *Giles v. Giles* (a), *Jarvis v. Pond* (b), and other like cases)—any thing in the context of the will by which the language of the clause I have cited can be modified or controlled,—the simple consideration is, what does that clause express? This depends upon the meaning of the word “them” in the second branch of that clause, in which the issue of brothers and sisters are substituted for the parents. If the word “them” refers to the brothers and sisters to whom the legacy is primarily given, and to no other brothers and sisters, it is impossible that the issue of *John* can have any interest in the question before me. If, on the other hand, the word “them” is to be understood as referring to brothers and sisters generally, and is not confined to the brothers and sisters before spoken of,—the issue of *John* may possibly bring themselves within the description of the issue contemplated.

That the first branch of this proposition is correct, must, I conceive, be clear, both upon the language of the clause itself, and upon authority. Under that clause, no brother or sister had ever a capacity to take who was not living at the date of the will. And as, by the supposition, the issue of brothers and sisters, whom the testator supposed capable of taking under his will,—the issue of a brother or sister not living at the date of the will cannot bring themselves within the description: *Christopherson v. Naylor* (c); *Butter v. Ommaney* (d); *Waugh v. Waugh* (e); *Peel v. Catlow* (g).

[*271] “It has, indeed, been made a question, whether the capacity of the primary legatee (at the date of the will) to take the legacy was alone sufficient, whether such legatee must not survive the testator, become a legatee in esse, and not have been a legatee and in posse only to entitle his issue to claim in substitution: *Thornhill v. Thornhill* (h). But later cases appear to sanction a more liberal, though still a literal, construction of language like that I am considering. And it has been held, that the issue of a person primarily pointed out as the object of a testator’s bounty, and living at the date of the will, may take substitution for that party dying in the lifetime of the tes-

(a) 8 Sim. 360.

(b) 9 Sim. 549.

(c) 1 Mer. 320.

(d) 4 Russ. 70.

(e) 2 Myl. & K. 41.

(g) 9 Sim. 372.

(h) 4 Madd. 377.

 1845.—Gray v. Garman.

tator,—*Smith v. Smith* (a); *Collins v. Johnson* (b); *Le Jeune v. Le Jeune* (c),—a construction which is certainly fortified by very important analogies (d). No such question arises here; but it was necessary that I should notice the point, because it explains and gets rid of many of the cases which were cited at the bar.

On the other hand, if the word “them” is not to be taken as referable exclusively to brothers and sisters before spoken of; if the entire clause is to be read as containing an original and substantive gift to two classes of legatees, namely, first to brothers and sisters living at the death of the wife, and, secondly, to the issue of brothers and sisters who may be dead at the time of the death of the wife,—there is nothing in the description of the second class to prevent the issue of *John* (though he were dead when the will was made) from bringing themselves within the very words of “the will: [*272] *Tytherleigh v. Harbin* (e); *Rust v. Baker* (g); *Bebb v. Beckwith* (h). The description (upon this hypothesis) requires only that the brother or sister be dead at the time of the wife’s decease, and there is nothing in that description which makes the time of their death material.

I have, therefore, simply to decide which of the above constructions the word “them” is to receive. Now, in the absence of authority, I cannot say there is a serious question to be argued. If there be no authority giving to plain words a technical meaning, beyond or differing from their natural meaning, the word “them” in this clause must refer, and exclusively refer, to the immediate antecedent.[1] But it was argued for the issue of *John*, that authority

(a) 8 Sim. 353.

(b) Id. 356, n.

(c) 2 Keen, 701.

(d) See cases cited in *Collins v. Johnson*, 8 Sim. 356, n., and *Humphreys v. Howes*, 1 Russ. & Myl. 639, and the later case.

(e) 6 Sim. 329.

(g) 8 Sim. 443.

(h) 2 Beav. 308.

[1] *Mowatt v. Carrow*, 7 Paige, 328. *Hone v. Van Shaick*, 3 Barbour, Ch. R. 498. *Crowan v. Pinckney*, 3 Barbour, Ch. R. 466. As a general rule, the testator is presumed to have used words in their ordinary or primary sense, in disposing of his property by will, especially where he has in other parts of his will, used different words to designate a person who is claimed to be included in a bequest or limitation over to a class of persons by giving a secondary sense to the words used by the

1843.—Gray v. Garman.

requires me to put a more extensive meaning upon the word, in order to take in the issue of every brother and sister who was dead at the date of the will. Such is not my conclusion from the authorities. In *Christopherson v. Naylor*, the question was,—as in this case,—whether the children of a brother or sister, who died before the date of the will, could take? Sir *William Grant* said, the question was, whether there was a substitution? and, therefore, it came to this,—not what description of issue could take under the second clause, supposing it an original substantive limitation,—but what description of parents might have taken under the first,—and he ultimately held, that the issue of children not living at the date of the will could not take. He did not hold that the plain meaning of the words could be controlled upon any abstract notion that the testator must be supposed to have intended any thing more than his words express—

[*273] ed. In *Butter v. Ommaney*, the gift was, after the death of the testator's wife and his brother *Joseph*, to be equally divided between the children of *Joseph* and his late sister *Betty*, and late brother *Jacob* (except *Bernard*); who should be then living, in equal shares and proportions; and as to such of them as should be then dead, leaving a child or children, such child or children were to be or stand in the place or places of his, her, or their parent or parents. It appears that the children, who died in the testator's lifetime, were all dead at the date of his will (a); and it was held, as in *Christopherson v. Naylor*, that those who died in the testator's lifetime were not entitled to any share. Upon the decision in *Waugh v. Waugh*, some doubt may perhaps be felt, so far as it depends upon the mere language of the will: *Tytherleigh v. Harbin*. But the case

(a) See note, 4 Russ. 73.

testator to designate the persons comprising such class. In *Matter of Hallett*, 8 Paige, 376. This is the general rule, and will prevail, unless it appear from the context, that he probably used them in some other sense, or unless by reference to extrinsic circumstances, the use of the words in a primary sense would render the provision of the will insensible or inoperative. *Mowatt v. Carrow*, 7 Paige R. 323. *Cromer v. Pinckney*, 3 Barbour Ch. R. 466. *Hone v. Van Shaick*, 3 Barbour Ch. R. 489. *Baker et al. v. Atlas Bank et al.*, 9 Metcalf, 197. *Tillinghast v. Cook*, 9 Metcalf, 149. *Royle v. Hamilton*, 4 Vesey, 437. *Wigram on Wills*, 15.

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directly follows, and supports the two cases I have already cited,—and the only question upon it is, whether the peculiar language of the will did not take it out of the reach of the principle applied to it by Sir J. Leach?

The case of *Peel v. Catlow* is to the same effect. A case of substitution, and not of original substantive gift to issue, and the decision was in conformity to the principle I have adverted to.

In *Giles v. Giles*, and in *Jarvis v. Pond*, the wording of the clauses giving the legacies apparently imported substitution as in the cases I have mentioned; but the Court, upon a critical examination of the will, found it impossible to satisfy all parts of the will, without treating the gift to the issue as original and substantive, and not as substitutionary. It was upon the express ground that the special language of the will required that construction, that the Court distinguished the case from those *to which [*274] I have referred. The other cases cited apply to questions differing from that before me.[1]

[1] In the case of *Giles v. Giles*, cited in the text, 8 Simon's R. 360. The residuary bequest was "In trust for all and every the children and child of my body living at the time of the decease of my dear wife, equally to be divided between or amongst such children (if more than one) share and share alike as tenants in common and if any such children or child shall be deceased before my dear wife, and such children or child shall leave issue of their, her or his body lawfully begotten, then the child or children of such my son or daughter shall be entitled to the portion of such son or daughter who may be deceased before the decease of my dear wife upon their attaining the age of 21 years, &c." The testator at the date of the will had four sons and one daughter, and he had another daughter who was then dead, leaving children, who survived the testator, and the question was whether the children of the deceased daughter were entitled to take under the will. Sir Lancelot Shadwell V. C. held that they were. He placed his decision upon the ground that as no sons or daughters were named in the will except Edward the trustee, to whom the words *such* and *said* referred, consequently that no other meaning could be affixed to the words *said sons and daughters*, but that meaning which was before expressed, "*children or child*." That being the case and finding that the testator had four sons and *two daughters* and that one daughter was dead, it was obvious that the testator must have had more in his mind the remembrance of the child that had been born and died, than the anticipation of a future child to be born and be a daughter. In *Jarvis v. Pond*, 9 Sim. 549, the testatrix having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters, for life; and after her decease, she willed that the said property be equally divided amongst such of my sons

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The division of the cases into two classes,—first, where the question has been, whether the issue of parties dying after the date of the will in the lifetime of the testator would take by substitution ; and, secondly, those in which there has been an original and substantive gift,—appears to me to remove all doubt with reference to their operation and effect.

On the second question, I have no hesitation in saying that the representatives of the brothers and sisters of the wife, who died after the testator, but in the lifetime of the widow, leaving no issue, are entitled to shares in the residue. The gift to the brothers or sisters who survived the testator, was determinable only on one event,—their death, leaving issue : that event did not happen, and their interest in the gift was, therefore, not taken away.

DECLARE, that the issue of *John* took no interest ; and direct the residue to be divided in seven equal shares, &c.

and daughters as might be living at the decease of the said Mary ; and in case of the decease of any of said sons or daughters, the surviving children of any of my sons and daughters, to have their father's or mother's part. The testatrix had had another son and daughter, both of whom were dead at the date of the will, leaving children. The Vice Chancellor held that the children of the deceased son and daughter were entitled to shares of the residue. In this case the Vice Chancellor placed his decision upon the ground that the language of the will warranted the conclusion that such was the intention of the testatrix. That without such a construction of the will there would be no children who could answer the description of *daughters*, in the plural number, except the daughter then living and the daughter who was then dead. It was argued in that case, that the words "in case of the decease" did not include pre-deceased children, but was only applicable to living children. To this argument the Vice Chancellor says, "But it appears to me, that the expression "in case of the decease of any of my said sons or daughters," exactly comprehended a pre-deceased child. See *Garey v. Wittingham*, 5 Beavan, 268. *Locker v. Bradley* 5 Beavan, 593. *Stopford v. Chaworth*, 8 Beavan, 331. *Salisbury v. Petty*, 3 Hare, 98. To the point that where reference is had to a particular class of children, unless there is something in the language to include children generally the will will not be construed to include children not within the general class. See also *Haverall v. Harrison*, 7 Beavan, 46.

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DOVER v. ALEXANDER.

[*275]

1843: 17th, 18th, and 21st January.

A married woman, having several legitimate children, and one illegitimate child, and being separated from her husband, and enceinte with a second illegitimate child appointed a fund to her illegitimate child then born, reserving a power of revocation, as to a moiety, in favour of any after-born children she might have born of her body.

After the birth of the second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund equally between the two illegitimate children:—*Held*, that the after-born children, for whose benefit the revocation might be made, must be taken in the primary and legal sense, as applying to legitimate children only,—that, therefore, the second illegitimate child was not an object of the reserved power, and could not take under the latter appointment.

The objection to the validity of a limitation to unborn illegitimate children is not founded exclusively on the uncertainty of description; nor, *semble*, is there any distinction between the validity of a limitation in favour of such persons, whether described as the children of a man, or the children of a woman.

By indenture, dated the 24th of November, 1804, made between *Henry Whetton* and *Elizabeth*, his wife, and their trustees and other parties a sum of 3,083*l.* was directed to be paid to trustees, upon trust to purchase the sum of 4,200*l.*, Three per cent. Consols, to the intent that the dividends thereof might produce an annuity of 126*l.*, secured to *Elizabeth Whetton* for her separate use as therein mentioned, during the joint lives of herself and her said husband, and, after the decease of such one of them—*Henry Whetton* and *Elizabeth* his wife—as should first die, to transfer the same stock and dividends thereof, and stand and be possessed thereof respectively, and of all and every part thereof, in trust for such person or persons, and for such ends, intents, and purposes, and in such manner and form, parts, shares, and proportions, as the said *Elizabeth Whetton*, as well when covert as sole, and notwithstanding her coverture by her then present or any future husband, and either absolutely and with or without revocation and new appointment, by any deed or deeds, instrument or instruments, in writing, to be executed in manner therein mentioned, or by her last will and testament, or any codicil or codicils thereto, to be executed in manner

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therein mentioned, should direct or appoint; and, in default thereof, in trust for *Elizabeth Whatton*, for her sole and separate use.

[*276] *By an indenture, dated the 28th November, 1804, made between *Elizabeth Whatton*, of the one part; and *Charles Watkinson* otherwise *Charles Watkinson Arkinstall*, of the other part,—*Elizabeth Whatton*, in consideration of natural love and affection, and in order to make a provision for *Charles Watkinson Arkinstall*, in the event of her decease, by virtue of the powers vested in her by the indenture of the 24th of November preceding, limited and appointed the said sum of 3,083*l.*, and the funds and securities in or upon which the same was or might be invested, saving her life interest therein, to hold the same unto *Charles Watkinson Arkinstall*, his executors, administrators, and assigns, absolutely, subject to a power of revocation therein contained as to one moiety of the said reversionary monies, funds, and securities, in favour of any after-born child or children the said *Elizabeth Whatton* might have born of her body, but not otherwise (a).

The 4,200*l.* stock was purchased in the names of the trustees, upon the trusts of the indenture of the 24th of November. At the date of the indenture of the 28th of November, *Elizabeth Whatton* was living separate from her husband, and had four legitimate children, namely, *Henry*, *John*, *William*, and *George*. *Elizabeth Whatton* had also one illegitimate child, the said *Charles Watkinson Arkinstall*, and she was at the same time enciente of another illegitimate child, *Margaret Brookshaw*, otherwise [*277] wise *Mary Brookshaw Arkinstall*, who afterwards intermarried with *Dover* and was, with him, the Plaintiff in the cause. *Henry Whatton* died in the lifetime of *Elizabeth*, his wife.

By indenture, dated the 2nd April, 1813, made between *Elizabeth Whatton*, of the one part; and *Charles Watkinson Arkinstall*,

(a) This deed was recited in the following deed of April, 1813 (which was proved on behalf of the Plaintiffs), and it was only stated in the bill as being so recited, without any other evidence of its existence: it was ultimately argued that *Elizabeth Whatton* should be taken as still having her general power of appointment, under the deed of the 24th of November, 1804, at the time she executed the deed of April, 1813. The Court held, that it was not open to the Plaintiffs on the pleading thus put to their case.

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and the Plaintiff, *Margaret Brookshaw Arkinstall*, of the other part, reciting the indenture of the 24th of November, 1804,—the purchase of the stock,—that the children of *Elizabeth Whatton* living were the said *Henry, John, William, and George*, and the said *Charles*, known by the name of *Charles Watkinson Arkinstall*, and the said *Margaret*, known as *Margaret Brookshaw Arkinstall*,—that *Margaret* had been born since the appointment of the 24th of November, 1804,—that both *Charles* and *Margaret* were infants,—and that *Elizabeth Whatton*, being very anxious and desirous that they should be provided for in equal proportions, as far as the same was possible, in the event of her death, the said *Elizabeth Whatton* in pursuance of her said powers, and in performance of of her agreement to that effect thereinbefore recited, and in consideration of her natural love and affection for her said infant children, *Charles* and *Margaret*, and for their advancement in the world, revoked and made void so much of the indenture of the 28th of November, 1804, as related to one moiety of the 4,200*l.* stock, and assigned all her (the said *Elizabeth Whatton's*) reversionary right and interest in the said 4,200*l.* stock (subject to her life estate thereon) unto the said *Charles Watkinson Arkinstall*, and *Margaret Brookshaw Arkinstall*, their executors, administrators, and assigns, equally between them, share and share alike, as tenants in common, and not as joint-tenants; and, in case either of them should die during his or her minority without leaving lawful issue, "then the share of him or her so dying to go to [*278] the survivor of them, his or her executors, &c., absolutely.

Charles Watkinson Arkinstall died in 1819, an infant, and unmarried. The Plaintiff, *Margaret Brookshaw Arkinstall*, intermarried with the Plaintiff *Dover*, in 1826. *Elizabeth Whatton*, their mother, died in April, 1839.

The bill was filed in October, 1839, by the said *Margaret Brookshaw* and her husband, and their trustees,—their interest in the fund having been settled on marriage,—praying a declaration that the Plaintiffs were entitled, under the indenture of the 2nd of April,

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1813, to the 4,200*l.* stock, and the dividends since the death of *Elizabeth Whatton*.

At the hearing,

Mr. *Temple* and Mr. *Lloyd*, for the Plaintiffs, submitted, first, that, under the original deed, giving *Elizabeth Whatton* the power of appointment, it was competent to her to appoint the fund to any person whomsoever, and that the power of revocation, which she reserved on executing that power, ought, as to the moiety to which it extended, to be construed as reserving all her previous powers,—or, if the latter construction was excluded, and the power confined to a revocation in favour of after-born children, the meaning of the word “children” should be ascertained by reference to the deed containing the reservation, in which the appointment was made in favour of one who was her illegitimate child. They contended,

also, that the difficulty in supporting a limitation to a [*279] bastard arose, not from the policy of the law, but from the uncertainty of description (a): and that wherever the description of the party exclusively, and of necessity, applied to the person intended to take, illegitimacy was no objection. Illegitimate children could not take in competition with legitimate, for the disposition was effectual without resorting to the former. In this case, there was no competition in construction between legitimate and illegitimate children; and the description of the persons to take under the appointment,—the after-born children of a woman,—afforded a perfect certainty of description. The distinction in this respect between such children of a woman, and of a man, was noticed in many cases. In *Blodwell v. Edwards* (b), it is said “the bastard of a feme is certainly known to be her issue.” In *Earle v. Wilson* (c), Sir *W. Grant* said, “If the bequest had been to the natural child, of which the particular woman was enceinte, without reference to any person as the father, there would be no uncertainty

(a) See Co. Lit. 3. b., n. 1:—“It is not the fact (for that the law will not inquire into,) but the reputation of the fact which entitles them.” 2 Jarman on Wills, ch. 31, p. 139; 1 Ves. & B. 462.

(b) Cro. El. 509.

(c) 17 Ves. 532.

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in that bequest, and probably it would be held good." Lord *Eldon* observed, in *Wilkinson v. Adam* (a), "I know no law against devising to the children of a woman, whether natural or not; as that creates no uncertainty. The difficulty arises upon a devise to the children of a particular man by a woman, to whom he is not married." And the same Judge, in *Gordon v. Gordon* (b), repeats, where "the gift is only to the child of a woman, there can be no uncertainty,—no fact to be tried; and then arises the question, whether, by the policy of the law, such a child is absolutely precluded from taking under any description whatever." Lord *Lyndhurst* also distinguishes the cases of the father and [280] mother, in *Mortimer v. West* (c); remarking that it was clear "that a bequest to unborn illegitimate children, describing them by reference to the father, would be altogether invalid." They referred also to *Dawson v. Dawson* (d); *Bagley v. Snelham* (e); *Beachcroft v. Beachcroft* (g); *Ex parte Haycock* (h). And they added, that the appointees being the children of a married woman, would be, *prima facie*, assumed to be legitimate until the contrary was shown.

Mr. *Roupell*, Mr. *Anderdon*, Mr. *Lovat*, Mr. *Wood*, Mr. *Bagehawe*, and Mr. *Blunt*, appeared for several parties claiming the funds, either under other alleged appointments, or in default of appointment.

Mr. *Spence*, for the representative of the surviving trustee of the fund.

VICE-CHANCELLOR:—

The bill, in effect, alleges, and it is admitted that the Plaintiff *Margaret*, in whose favour the appointment was attempted to be made, and *Charles*, who is since dead, were both illegitimate. No issue is tendered as to that fact. And, indeed, whatever the law

(a) 1 Ves. & B. 446.

(c) 3 Russ. 375.

(e) 1 S. & St. 70.

(h) 5 Russ. 184.

(b) 1 Mer. 151.

(d) 6 Madd. 292.

(g) 1 Madd. 420.

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may formerly have been, the cases in which the question of adulterine bastardy has arisen shew, that, where the husband and wife are in such circumstances that all presumption of access is rebutted, the children will be regarded as illegitimate.

It has been insisted, in argument, that the after-born [*281] illegitimate of a woman are capable of taking from "their mother an interest, in the character of children, in cases where such children of a man could not take any interest in that character. What the decision ought to be in a case where that argument applies, I am not called upon to give any opinion; but if I wanted authorities to shew that, with reference to the children of females as well as those of males, the word "child," uncontrolled by the facts, and unexplained by the context of the deed or will, must have its primary and legal meaning, I should have no difficulty in finding them. The cases of *Wilkinson v. Adam* and *Mortimer v. West* leave no doubt that the opinions of the learned Judge before whom those cases were argued was against the proposition, that even an after-born illegitimate child of a female can take under the simple description of a child of that person.

The original power of appointment, vested in *Elizabeth Whatton*, would have enabled her to appoint to any children, whether illegitimate or not, if it was exercised in a form that the law could support. By the deed of the 28th of November, 1804, the whole fund was appointed to *Charles*, reserving a power of revocation as to one moiety "in favour of any after-born child or children the said *Elizabeth Whatton* might have born of her body, but not otherwise." *Elizabeth Whatton* does not in this deed speak of *Charles* as being her son, either legitimate or illegitimate, but simply describes him by his reputed name. There is nothing whatever, so far as I can discover, from which any light can be thrown upon the sense in which she intended to use the word "child." If she had there described *Charles* as her child, perhaps an argument might have arisen, whether the word "child," employed afterwards, was not used in the same sense. I do not say that it would have affected [*282] the case. The word "child" has often been construed in two different senses in the same instrument. If a gift

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were made to the children of A. now living,—if A. had none but illegitimate children, and they had acquired by reputation the character of his children,—they would, no doubt, take under the gift; and a bequest by the same will to the after-born children of A. would be satisfied by construing the word “child” in its proper sense, and in the latter bequest illegitimate children would take no interest. *Fraser v. Pigott* (a) is not the only decision on that point.

In the argument of this case, I have called on the counsel for the Plaintiffs to shew me that I have any right to suppose that other than legitimate after-born children were intended. It does not appear to me that the words “born of her body, but not otherwise,” add any thing to the effect of the word “child.” They leave the legal interpretation uncontrolled. The cases of *Cartright v. Vawdry* (b), *Godfrey v. Davis* (c), *Fraser v. Pigott*, *Wilkinson v. Adam* (d), *Swine v. Kennerly* (e), *Harris v. Lloyd* (g), *Mortimer v. West* (h), and *Bagley v. Mollard* (i), all decide that the word “child,” taken simpliciter, means a legitimate child only, unless there are any words by which that sense may be controlled, or any thing in the context shewing that the word is intended to be used in a secondary sense, or some extrinsic facts and circumstances, which shew that the word “child” could not have been used in its only proper sense. [1] In this case, it does not appear to me that there

(a) 1 You. 354.

(c) 6 Ves. 43.

(e) 1 Ves. & Bea. 469.

(h) 3 Russ. 370.

(b) 5 Ves. 530.

(d) 1 Ves. & Bea. 465.

(g) 1 T. & R. 310.

(i) 1 Russ. & Myl. 586.

[1] In the construction of a will the word “children” in its primary and ordinary sense, means the immediate *legitimate* descendants of the person named; and where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include *illegitimate* offspring, or step children, or children by marriage only, grand-children, or more remote descendants. *Cromer v. Pinckney*, 3 Barbour Ch. R. 466; *Hone v. Van Shaick*, 3 Barbour Ch. R. 488; *Collins v. Hoxie*, 9 Paige Ch. R. 81; *Mowat v. Carow*, 7 Paige Ch. R. 328; *Radcliffe v. Buckley*, 10 Vesey 195. *The Earl of Oxford v. Churchill*, 3 Vesey & Beam. 69. *Gardner v. Heyer*, 2 Paige R. 11. Although under a bequest to children, grand-children are not entitled except from necessity. But if the will would be otherwise inoperative, or where there are other words, such as arise, from which it clearly appears that the word “children” was not

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is anything on the face of the instrument to divert the expression from its proper meaning.

[*288] *On the controlling effect of extrinsic circumstances upon the instrument, I may refer to the case of *Gill v. Shelley* (a), where a testatrix directed that the residue of her estate would be divided amongst certain classes of persons mentioned in her will, and added, "amongst whom I include the children of the late *Mary Gladman*." *Marg Gladman* was then dead, having left two children only,—one legitimate, and the other illegitimate,—so that the plural term "children" could not be satisfied by giving the property to the single legitimate child; and Sir *John Leach* held,

(a) *Rolls*, 27th January, 1831. See a note of *Gill v. Shelley*, in *Wigram's Examination of the Rules of Law on the Admission of Extrinsic Evidence*, &c., p. 44, par. 55, ed. 3.

used in the proper sense, in a more extensive sense grand-children will be included. *Radcliff v. Buckley*, 10 Ves. R. 196. See also *Royle v. Hamilton*, 4 Vesey, 437. Where there is a total want of persons answering the description in the will, others who do not so completely answer it may be let in; and in such cases grand-children may be let in under a liberal construction of the word children, but not if there are children. *The Earl of Oxford v. Churchill*, 3 Ves. & Beam. 69. See also *Reeves v. Brymer*, 4 Ves. R. 692. *Crooke v. Brookeing*, 2 Vernon, 106. *Henry v. Dillon*, Amb. 603. Chancellor Walworth in *Gardner v. Heyer*, 2 Paige Ch. R. 11, laid down the rule, that if the testator had children, parol evidence could not be admitted to show that a different class of persons were intended. But that it was always proper to look into circumstances dehors the will to ascertain whether there were any persons answering the description of the legatees in accordance with the will, and if there were no such persons, then the situation of the testator's family might be proven to enable the court to ascertain the persons intended by the testator as the objects of his bounty. In the case last cited, the testator had never been married, but lived and co-habited with M. S. in a house provided and furnished by him, and while so living had by her four illegitimate natural children, one son called John, and three daughters who were with his knowledge and consent baptized by his name, and were educated and acknowledged by him as children, and who were the only persons ever recognized by him as children. By his will he gave his "son" John \$10,000, payable when he arrived at 24 years of age, and to each of his daughters \$3000, payable at 21; and directed his executors to pay M. S. \$65 quarterly during her life, if she remained unmarried and had no more children. It was held that this was a sufficient description of the testator's natural children by M. S., as the legatee intended, and they were entitled to take under the will. The decision was placed upon the ground that the testator could not have included legitimate children which he might have by a future marriage; for all of the objects of his bounty was described as his son John, and the others as his daughters.

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that both of the children were entitled. The express ground was, that the words were not capable of being satisfied without a departure from their primary sense. In *Pocock v. Bishop of Lincoln* (a), a that, father seised in fee of a perpetual advowson devised it to his son, who, at that time, was the incumbent of the living: there it was argued that, inasmuch as the devisee had a life interest at the time in the subject of the devise, unless the words "perpetual advowson" were construed to carry more than a life interest, he took nothing by the devise. There could scarcely be a stronger case for implication. The Court however, refused to enlarge the meaning of the words, upon this ground,—that, if the incumbent resigned the living, or accepted preferment, or in certain other possible events, the devise would give the right of presentation to the living, and, therefore, in such possible event, the words might have some operation, without departing from their proper sense. In *Doe d. Oxenden v. Chichester* (b), a testator devised his estate of "*Ashton*" to *Oxenden*. It was "proved that the testator had an estate, which he used [*284] to call his "*Ashton* estate," the accounts relating to which were kept under that name, though a small portion only of the estate was locally situated at *Ashton*; and the Court said, that the words, strictly interpreted, meant the small portion of the estate which was locally situated at *Ashton*; and though, from the evidence tendered, there was no more doubt of his intention to devise the whole estate than if he had used the most unequivocal words to that effect, yet they said the rule was inflexible, that, if the words, strictly interpreted, had a sensible operation, their meaning ought not to be departed from. So, in *Doe d. Westlake v. Westlake* (c), a devise of an estate to "*Matthew Westlake*, my brother, and unto *Simon Westlake*, my brother's son,"—the testator had three brothers, each of whom had a son, named *Simon*,—and evidence was tendered to prove that the testator meant *Simon*, the son of his brother *Richard*; and the Court received the evidence. Upon a motion for a new trial, it was held, that, in strict construction, the *Simon* who was meant must be the son of *Matthew*, the brother, who was previously

(a) 3 Brod. & Bing. 27.

(b) 4 Dow, 65; S. C. 3 Taunt 147.

(c) Stat. 7 Will. 4 & 1 Vict. c. 26, s. 27.

 1848.—Pearce v. Creswick.

mentioned,—the last antecedent in the will; and the evidence which the Court below had received was rejected.

The strongest cases upon this point are those which relate to powers. Before the late Statute of Wills (a) came into operation, it had repeatedly been decided, that, under a devise of “my real estate,” property of the testator subject to a power would pass, if he had no real estate which would satisfy the devise; and that if there were any real estate belonging to the testator upon which the [*285] will could operate, it was otherwise. “But a bequest of “all my personal estate” was never held to pass property over which the testator had only a power of appointment, because, as the will would pass after-acquired personal estate, the words might possibly have a sensible construction, without departing from their strict and primary meaning. The rule undoubtedly is, to ascertain, in the first place, whether the words can, with reference to the facts, have a sensible operation in their primary sense; and they must be construed in the primary sense, if the facts do not exclude it.[1]

Suppose that, in the case before the Court, *Elizabeth Whotton* had afterwards married again, and had had a family of legitimate children,—is it possible to say that an illegitimate child would have been within the power? There is, in fact, nothing to shew that the parties did not look to that event. The bill must, therefore, be dismissed.

[*286]

*PEARCE v. CRESWICK.

1848 : 23rd, 24th, and 31st January.

A banking company, in acknowledgement of monies deposited with them by H. gave him two accountable receipts for 100*l.* each, on which, according to the course of dealing, interest would be paid. H. died; and pending a contest for the administration of his estate, the receipts came into the possession of a stranger, who fraudulently obtained payment from the bank, and the receipts were returned to the bank, and cancelled :—*Held*, that the administrator of H. might

(a) 4 B. & A. 57.

[1] See note to ante, p. 272.

1843.—Pearce v. Creswick.

sustain a suit in equity against the banking company for payment of the sum for which the receipts were given.

The necessity, arising from the nature of a transaction, to sue in equity for discovery, is a material circumstance to be regarded in considering the jurisdiction of the Court to give relief in the same case; but the necessity of coming into equity for discovery does not necessarily carry with it the right to relief.

Where, on a bill for relief by a Plaintiff having a legal demand,—if the court of equity had refused its aid, the Plaintiff would have been compelled to try his right at law, whilst documents constituting evidence of his right were in the possession of the Defendant, the Court, in order to determine the title of the Plaintiff to the possession of the documents, being obliged to enter into the legal question, will entertain the whole case, and give the Plaintiff the same relief as he would have had at law [1]

GEORGE HURST was a creditor of the *Sheffield and Rotheram Banking Company* in the sum of 200*l.*, for which he had taken two receipts, described in the bill as accountable receipts, numbered 721 and 722, in the following form :—

“ No. 721. *Sheffield and Rotheram Bank,*
Sheffield, August 18, 1837.

“ Received of Mr. George Hurst the sum of one hundred pounds, to be accounted for.

“ For the *Sheffield and Rotheram Banking Company,*
£100. “ *W. Brown.*”

The course of dealing, so long as the deposits on such instruments continued, was, that the parties to whom they were given returned them to the bank once in the year to be cancelled, when they were then paid, or allowed the interest for a past year, and took other receipts in place of those which were delivered up.

George Hurst died on the 21st of January, 1838, having by his

[1] Where the Court gets jurisdiction of a case for one purpose, and when in such cases it will entertain the whole case and administer full relief, See *Glen et al. v. Fowler*, 8 Gill. & John. 340. *Crane v. Bunnell, et al.*, 10 Paige, 333. *Bradley v. Bosley*, 1 Barbour Ch. R. 125. *Pratt v. Northam*, 5 Mason, 105; *Armstrong v. Gilchrist*, 2 John. Cases, 424. *Marlin v. Dryden*, 1 Gilman R. 187. *Rathbone v. Warren*, 10 John. R. 587, 596. *Chichester v. Vase*, 1 Mumf. 98. *King v. Baldwin*, 17 John. R. 384. *Le Roy v. Veeder*, 1 John. Cases 417. *Hepburn v. Dundas*, 1 Wheat. 179. *Ludlow v. Simonds*, 2 Caines' Cases, 38, 51, 52. *Isam v. Gilbert*, 3 Conn. R. 166. *Middletown Bank v. Russell*, 3 Conn. R. 139. *Russell v. Clark's Ex'rs.* 7 Cranch, 69.

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will bequeathed the greater part of his property to the Plaintiff. The will was disputed by a nephew of the testator, also named *George Hurst*, and by *William Hurst*, the half-brother of [*287] the testator. On the 25th of January, after attending the funeral, *William Hurst* went to the bank and desired Mr. *Brown*, the clerk who signed the receipts, not to pay the money mentioned in the receipts to any person "until the heir or right owner should be known." Of this communication, which was verbal, and did not proceed from any then having authority to interpose, the bank appeared to have taken no notice.

The receipts, by means which did not appear, came to the possession of *George Hurst*, the nephew. On the 1st of February, *George Hurst*, the nephew, produced the receipts to *Eyre*, an innkeeper at *Worksop*, and *Eyre* presented them for payment at the *Worksop* branch of the *Nottinghamshire Bank*, where he was told by a clerk of the bank that if the receipts were endorsed by *George Hurst* they would cash them. *Eyre* then took the receipts to *George Hurst*, the nephew, who endorsed them with the name "*George Hurst*;" and on *Eyre* presenting them to the *Worksop Bank* the second time, so endorsed, the *Worksop Bank* not being aware that there were two persons named *George Hurst*, or that the *George Hurst* to whom the receipts had belonged was dead, paid *Eyre* the 200*l.* and took the receipts. On the 3rd of February the amount of the receipts so paid was in the course of business charged by the *Nottinghamshire Bank* to their *London* bankers, to whom they were remitted; and on the 5th of February, the same *London* bankers were directed by the *Sheffield* and *Rotheram Bank* to give the *Nottinghamshire Bank* credit for the amount paid, and the receipts were delivered up to the *Sheffield* and *Rotheram Bank*, and cancelled, by tearing off the signature at the foot.

On the 8th of February, 1838, the solicitor of *William Hurst* applied to the *Sheffield* and *Rotheram Bank* on the subject [*288] of the receipts, informing them of the death of the testator, and of the claim of *William Hurst*, when he was told that the receipts had been presented and paid through the *Nottinghamshire Bank*.

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The proof of the will was contested in the Ecclesiastical Court, and sentence was not pronounced in its favour until November, 1839. Letters of administration, with the will annexed, were granted to the plaintiff on the 21 st of November, 1839.

The bill which was filed against the director and public officer of the *Sheffield and Rotheram* Banking Company stated the debt due to the testator, and that it had not been paid to any person legally entitled to receive it, and that the receipts had come into the possession of the *Sheffield and Rotheram* Banking Company, and prayed that they might be compelled to give full, true, and complete information respecting the said debt, and that an account might be taken of the principal sums of money due from the company to the testator at the time of his decease on the said two accountable receipts, together with interest thereon after the rate they respectively carried, up to the time the Plaintiff requested payment thereof to be made to him, and interest thereon at four per cent. per annum from the time when the Plaintiff requested payment thereof, and that the Banking Company might be decreed to pay to the Plaintiff, as the legal personal representative of the testator, what upon taking such account, should appear to be due from them, the Plaintiff offering, out of the assets of the testator received by him, to pay what, if anything, should appear to be due from the testator to the Banking Company, on taking such accounts; and that for the purposes aforesaid, all proper and necessary directions might be given and orders made: or that if the Court "should [289] be of opinion that the Plaintiff was not entitled to such relief aforesaid, then that the Banking Company might be decreed to deliver up to Plaintiff, as the legal personal representative of the testator, the said two accountable receipts, numbered 721 and 722 respectively, and that they might be restrained by injunction from parting with or destroying or defacing the same.

The answer admitted the facts, as above stated, but submitted, that in the course of business the sums in respect of which receipts of this description were given were paid to any bank, or any person of respectability who presented the same for payment, and that the Defendants had paid the amount of the receipts in question, according

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to their custom in such cases, and that they were justified in so doing. They submitted that the Plaintiff had no title to sue in equity, and that the case was within the exclusive jurisdiction of the courts of law, and claimed the same benefit of the objection as if they had demurred to the bill.

Mr. *Tinney* and Mr. *Romilly*, for the Plaintiff, in support of the argument, that the possession of the accountable receipts by the Defendants entitled the Plaintiff to sustain the suit in equity, either to the whole extent of the relief sought, or at least to the extent of ordering the receipts to be delivered up, or others given to the Plaintiff, that he might be placed in the same situation as he would have been if they had not been abstracted from him, cited *Ryle v. Haggie* (a) and the note of a case in *Maddock's Treatise on Chancery*, p. 269, ed. 3 (b). In *The Corporation of Carlisle v. Wilson* (c), Lord *Eldon* said that an account could not be decreed in every case where assumpsit would lie, but that the Court gave that relief where the subject could not be so well investigated by the action: *Barker v. Dacie* (d). In *Beckford v. Beckford* (e), cited in *Hovey v. Blakeman* (g), the Court decreed the delivery up of bills of lading at the suit of the party legally entitled to the estates of which the goods comprised in the bills of lading were the produce.

Mr. *Walker* and Mr. *Tillotson*, for the Defendants, contended, first, that the Plaintiff had no title at law to recover the money in respect of which the receipts had been given. The Defendants had paid the debt, on the presentation of the instrument, in the ordinary course of

(a) 1 J. & W. 234.

(b) Mr. *H. Jeremy*, the learned editor of this portion of the third edition of Mr. *Maddock's Treatise*, on being communicated with on the subject of this note, stated that it was found in the MS. of Mr. *Maddock*, and that it was probably a note taken by him in Court. It is as follows:—"In another case, a person had, at different times, deposited several sums of money with a banker, who gave acknowledgments of the receipt of the money as paid, and afterwards, on some pretence, obtained the receipts, and then refused to pay the money. A bill was filed for a discovery of the monies so received, and payment of the same; and *Vice-Chancellor Leach* decreed in favour of the plaintiff, though it was objected that a discovery only was necessary, and that the plaintiff might then proceed at law."

(c) 13 Ves. 279.

(d) 6 Ves. 686.

(e) 4 Bro. P. C. 41, Toml. ed.

(g) 4 Ves. 609.

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their business. Every person dealing with the bank must be assumed to know the custom of the concern, and is liable to be affected by any act done in conformity with that understood custom, although it might be prejudicial to him. Secondly, the object of the suit is to compel the Defendants to pay a second time a debt which they have already bona fide paid—a payment which, even if made in error, was owing as much to the Plaintiff having permitted the instruments to be out of his possession, and thus misled the Defendants, as to any want of caution in them: it is therefore not a case for the interference of a court of equity on the ground of hardship, the hardship being at least equal. Thirdly, whatever right the Plaintiff may have is simply at law. There is no case for changing the jurisdiction. The attempt is made on several pretences. 1. The account: but there is no account to be taken; these receipts do not even entitle the holder to interest; and if they did, it is no more a case for an account than any debt upon a promissory note or bill of exchange would be. The items are all on one side; *Bowles v. Orr* (a). 2. Being entitled to discovery, the Plaintiff insists that the Court will go on and give relief. If it were so, there would be no bills for discovery merely. 3. The Defendants withhold the receipts: but they are bona fide purchasers of the receipts, and paid for them in ignorance of the Plaintiff's claim: there is no case of spoliation or fraud of any kind. 4. The suit is said to be founded by analogy on the course which the Court takes with reference to lost instruments. But this is not a case in which proof is necessary at law, nor in which the Defendants would be entitled to any indemnity, if the Plaintiff recovered against them. The jurisdiction of equity to give relief in cases of lost instruments rests upon a principle not applicable to this case: *Macartney v. Graham* (b); *Hansard v. Robinson* (c); *Threlfall v. Lunt* (d). 5. The Plaintiff insists alternatively that he is entitled to have the receipts delivered up: but this assumes the whole question in his favour. The case of the Defendants—a question of law—is, that the receipts have been properly cancelled; if so, the case of the Plaintiff fails. On the other hand, suppose the

(a) 1 Y. & Coll. 464.

(b) 2 Sim. 285.

(c) 7 B. & C. 90.

(d) 7 Sim. 627.

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equity for discovery, is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction: further than this, I have not been able to follow this branch of the Plaintiff's argument.

A second branch of the Plaintiff's argument was founded upon the well-known and undoubted jurisdiction of the Court in the cases of lost instruments.

The answer of Mr. *Walker* to this argument was, that the circumstances upon which the jurisdiction of equity is founded in such cases are wholly wanting here.—namely, the necessity, in some cases, of making profert at law of the lost instrument,—in others, of giving the Defendant an indemnity,—in others the spoliation or fraudulent suppression of an instrument. And, certainly, so far as the jurisdiction of equity to give relief in cases of lost instruments depends upon any of such grounds, I have heard nothing from the Plaintiff which would displace the force of the argument against him.

It is on the third ground upon which the Plaintiff [*295] has rested his equity,—the interest which he has in these accountable receipts,—whether as the subject of property, or as evidences of his right for the purposes of a suit,—that I think I cannot repudiate, but am bound to affirm the jurisdiction of the Court in this case.

I will first consider the point apart from the pleadings; and suppose the bill in this cause to be a bill simply to have the receipts delivered up, in order that the Plaintiff might proceed upon them at law: that would plainly be a case for equitable relief, subject only to a question at the hearing as to the mode in which this Court would try the right,—regard being had to the consideration, that the equity depended upon a purely legal question (a). The interest of the lender of the money in the receipts would be at once incontrovertibly established by the suggestion, that he had originally lent his money upon the faith of his holding a written acknowledgement of his debt under the hand of his debtor: that the possession by the debtor of the evidence of the Plaintiff's title to which, by the original contract, the creditor was thus entitled, and that in a cancelled

(a) Lord *Redesdale*, *Tr. Pl.*, p. 95, ed. 3, p. 117, ed. 4.

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state, raised, *prima facie*, a case against the creditor, and did, to some extent at least, “prevent him from effectually asserting in the courts of ordinary jurisdiction rights founded on principles acknowledged by those courts (a).” If the want of the instrument in a case like this be not so serious an impediment at law as would be the loss of a bond or other instrument under seal, it is still a great burden upon the Plaintiff, if he be compelled to try his right at such a disadvantage. That the Plaintiff has a most important interest in the possession of these receipts cannot, therefore, be denied or doubted. And, unless “the Defendants can [*296] make out that the receipts came into their possession under circumstances which have absolved them in equity from their original contract with, and liability to, the Plaintiff in respect of the debt of which those receipts are the evidence, I cannot but think the Plaintiff must have an equity to try in this Court his legal right to the possession of the receipts of which I now suppose him to be seeking only the possession. It can be no conclusive answer to such a bill to say the right to the receipts is purely a legal question.

The jurisdiction of the Court to investigate the title of a Plaintiff to the possession of writings, is a jurisdiction to investigate legal rights; and the equity to a decree for such relief, is more frequently rested upon the legal right than upon any other ground. If it be once admitted, that the legal title to documents may be investigated in equity, with a view to a decree for giving possession of them, the whole question of jurisdiction is given up. The difficulty which a court of equity may experience in deciding upon the legal title, may render it necessary to resort to the ancillary jurisdiction of a court of law: but it cannot oust the equitable jurisdiction of this Court, or be even a legitimate argument against that jurisdiction.

The only question can be, whether the Court will itself try the matter, or send it to law in the first instance, and finally decide the cause upon the equity reserved? This part of the case was put by Mr. Walker in the strongest possible light for the Defendants. He endeavoured to shew,—and I think succeeded in shewing,—that, in order to decide the legal right to the possession of the receipts

(a) *Id.* 92, ed. 3, p. 113, ed. 4.

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(with a view even to the proceeding in an action for the money for which they were given), I must decide precisely the same point as if I were trying the right to the money itself. The conclusion however, which I draw from that argument is,—not that I cannot,

therefore, try the right to the receipts,—but that, being [*297] bound at the Plaintiff's instance to try that right, I

may also be able to give the whole relief which the Plaintiff asks, including the payment of the money,—the same result that the trial, according to the argument, would carry with it.

The jurisdiction to try the right to the possession of the receipts being once established, the discretion of the Judge in equity, who tries the cause, must determine whether he will decide it with or without the aid of a court of law. If the Plaintiff is correct in saying that these peculiar instruments carry a right to interest upon the amount secured, that is an additional argument in favour of their value to him.

The reasoning of Sir *Thomas Plumer*, in the case of *Ryle v. Haggie* (a), supports the view which I have taken of the right of the Plaintiff to be protected from the consequences which may arise, from the situation of these instruments. The case cited from *Madcock's Chancery practice* (b) is also strongly in point, and accords with the same view.

With respect to the frame of the bill, the first alternative seeks the whole relief which the Plaintiff requires,—it asks an account, and payment; but if the Court should refuse to decree payment the latter alternative of the bill points to a more limited relief, which is substantially included in the former. I think that, upon these pleadings, the Court may give whatever relief, in the circumstances of the case, the Plaintiff is entitled to.

The only remaining question then is, whether,—the Plaintiff having, to some extent at least, a clear equity,—I ought to send the case to be tried in a court of law, which was the course adopted by Sir *William Grant* in the case of *Seagrave v. Sea-* [*298.] *grave* (c), or decide the whole matter here. That case

(a) See 1 J. & W. 237—8.

(b) Ed. 3, p. 260. Ante, p. 289.

(c) 13 Ves. 439.

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differs materially from this. It does not appear to me that there is in this case any need of sending the Plaintiff to a Court of law, in the first instance, to try the question whether he is entitled to payment of the debt for which the receipts were given in order to entitle him to delivery up of the receipts. There is, in truth, no answer set up to the Plaintiff's claim, so far as the debt is concerned, apart from the mode of recovering it. The Defendants do not pretend that the receipts were transferrable in the sense that the holder was entitled to demand payment. They do not set up any usage or custom of such a kind, but they merely insist that it is, in the course of business, the practice of the bank to pay the amount of the receipts to any *respectable* party presenting them; or, in other words, they ascertain, or endeavour to ascertain, by a fact extraneous to the mere possession of the instrument,—namely, the respectability of the party,—that he is entitled to require payment. The *Nottinghamshire* Bank acted on this practice,—they took the precaution of having the receipts indorsed; but they were defrauded by the parties to whom they paid the money. I cannot say that there is anything in such circumstances which has, in equity, absolved the Defendants from their original liability to pay the debt of which the receipts are evidence, or any reason why a Court of Equity should not exercise its jurisdiction to investigate a legal question with a view to equitable relief, or any reason why I should not myself decide that legal question. Having come to this conclusion with respect to the right of the Plaintiff to the money expressed in the receipts, and, as a necessary consequence, his right to the instruments, are evidences of the debt, so long as the debt is unpaid,—I think the jurisdiction of this Court is not confined to relieving the Plaintiff from the mere difficulty which the absence of these instruments occasions, reserving further directions, and leaving him "to try the same question in a Court of Law which, [*299] upon all the evidence that, it is suggested, the case affords, I have already decided in his favour; but that the Court may, at the hearing, decree payment to the Plaintiff of the principal debt and the interest and costs.

Decree accordingly.

 1843.—Whitaker v. Newman.

WHITAKER v. NEWMAN.

1843 : 27th January, 22nd and 23rd February.

An heir-at-law, by his answer, admitting the execution of the will under which the Plaintiff claims, but alleging that it was revoked by a subsequent will, whereby the estate in question was devised to the Defendant, which subsequent will was unintentionally destroyed, and submitting either that the subsequent will ought to be established, or that there was an intestacy,—is not entitled to an issue devisavit vel non.

The Defendant, in such a case, not giving any evidence of the alleged revocation beyond the mere statement, which was read by the Plaintiff from the answer, is not entitled to any inquiry respecting it, and the Court will declare the will established.

THE testator by his will, dated in 1810, gave, devised, and bequeathed all his real and personal estate to his wife for her life, with remainder to the defendant *Samuel Newman*, his eldest son and heir-at-law, his heirs, executors and administrators, upon condition of his paying four-fifths of the amount at which the same should be valued to the other four children of the testator. The testator died in 1839, and the widow in 1841. The bill was filed by his other children against the Defendant *Samuel Newman*, stating that the Defendant had disputed the will in the Ecclesiastical Court, alleging an intestacy, but that the Court had pronounced the sentence in favour of the will. The bill prayed that the will might be established against the Defendant, and the interests of the parties under the same ascertained and declared.

The Defendant by his answer admitted the execution of the will of 1810, but submitted to the Court whether under the circumstances thereafter mentioned the said will of 1810 was the last will of the testator : and the Defendant said that in 1833 the testator duly made, executed and published another will, dated the [*300] 24th of June in that year, whereby he gave and bequeathed all his real and personal estate to the Defendant, his heirs, executors, administrators and assigns, subject to the payment of an annuity to his (the testator's) wife, and of certain legacies to his other children : and the Defendant said that he had been informed and believed the will of 1833, and also a prior will

 1843.—*Whitaker v. Newman*.

of the testator, made in October, 1826, were burnt or destroyed by a child named *William Whitaker*, then of the age of four or five years, a grandson of the testator, in the testator's lifetime, and that the testator intended to have destroyed the will of 1810, instead of the said wills of 1833 and 1826 : and the Defendant said that, by such will of 1833, the testator expressly revoked and made void all former wills and testamentary dispositions at any time by him there tofore made : and the Defendant submitted, that by such will of 1833 the prior will of 1810 became and was revoked, and that under such circumstances the said testator either died intestate as to his real estate, or that the will of 1833 ought to be established ; and that, for the reasons and under the circumstances aforesaid, the Defendant did not dispute the validity of the will of 1810.

In the place of proof of the execution of the will of 1810, the admission in the answer was read on behalf of the Plaintiffs at the hearing, when

THE VICE-CHANCELLOR refused the application of the heir-at-law for an issue, and declared the will established. The cause was afterwards reheard.

Mr. *Roupell* and Mr. *Rolt*, for the Plaintiff.

Mr. *Shebbeare*, in support of the title of the heir-at-law to an issue *devisavit vel non*, cited *Pemberton v. *Pemberton* (a) ; *White v. Wilson* (b) ; *Bootle v. Blundell* (c) ; *Levy v. Levy* (d) ; *Locke v. Colman* (e), *Story, Com. Equity Jur.*, vol. 2, p. 672, s. 1447 ; 2 *Fonbl. Tr. Equity*, b. 4, s. 3, p. 319 ; and said, that if the statement of the facts in the answer of the heir-at-law, which had been called for by the interrogatories of the bill, had the effect of depriving the heir-at-law of his ordinary right of trying the validity of the will in an issue, the Court would assume a power of determining the question whether there was or not a will of real estate, which it did not possess with respect to a

(a) 11 Ves. 53 ; S. C. 13 Ves. 290.

(b) 13 Ves. 91.

(c) 19 Ves. 494.

(d) 3 Madd. 245.

(e) 2 M. & Cr. 42.

1848.—Whitaker v. Newman.

will of personal estate ; and that the right of the heir-at-law to an issue would be, consequently, limited to those few cases in which the heir is able, in his answer, to say that he does not believe any will was executed by the testator. The decree, if made without an issue, will be a surprise upon the heir-at-law, who, relying upon the usual course, to a court of law the determination of the validity of a will of land, has not thought it necessary to go into evidence in this Court.

VICE-CHANCELLOR:—

The bill is filed to carry into execution the trusts of a will alleging a devise, and praying that it may be established against the heir-at-law. The heir-at-law admits the due execution of that will ; and then goes on to say he is informed, and believes, that the testator made another will, which, he insists, ought to be established ; or, if the subsequent will cannot be established, on account of [*302] its having been destroyed by accident, *(which must be the case he intends to set up), yet, inasmuch as the second will revoked the first, an intestacy will arise.

The general right of the heir-at-law to an issue is unquestionable ; but that rule does not apply to a case in which he admits the will. There is, then, no reason for directing an issue. In this case, if the Defendant claimed as heir-at-law, he would be entitled to an issue as of course ; but I have never understood that a person alleging himself to be a devisee was entitled to it. A devisee, like an ordinary party, is required to prove the case upon which he insists. I agree in the suggestion of the Real Property Commissioners (a), that, where a case must be determined by a court of law, it is better that the trial should be directed as soon as the issue is joined between the parties, although possibly there may have been some evidence to be gone into in this Court ; otherwise, the devisee goes into evidence, which, if disputed, turns out to be an useless expense, productive not only of delay, but often of very serious mischief. In addition to this, the value of the evidence is usually lessened by subjecting wit-

(a) Fourth Report, pp. 36, 66, 69.

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nesses to repeated examinations. The case of *Gompertz v. Ansdell* (a) was a strong illustration of the inconvenience of the common rule. The evidence taken in this Court was extremely voluminous, whilst it was perfectly obvious that the case must go to a court of law. Still I apprehend the rule of the Court now is, that the devisee, to entitle himself to an issue, must prove his case.

Upon the question, whether the heir-at-law,—admitting the will, and setting up a simple revocation, which would have the effect of creating intestacy,—must *not prove the revo- [*303] cation,—I am not called upon to give an opinion. If the bill were to allege a will, and the heir-at-law were to admit it, and allege a revocation,—the Plaintiff proving, per testes, that the will was duly executed,—I do not say that I feel persuaded the common rule would entitle him to the issue, without having given some evidence of the fact of revocation. I give no opinion upon that point, which does not arise before me.

In the present case, the heir-at-law, without qualification, admits the first will; and adds, that a subsequent will was made in 1833, whereby,—not that the testator merely revoked the first will, and, consequently, died intestate,—but that he devised the estate in a different manner. Now, suppose the second devise had been in favour of a stranger,—the bill being against the heir-at-law to establish the will,—could it be suggested, that, because the heir-at-law stated that the testator executed the first will, and afterwards, by a second valid will, devised the estate to another,—he would, as heir-at-law, be entitled to have an issue upon the first will tried,—not to establish his own right for, by the very supposition of the case, the descent would be broken,—but only to prove that the Plaintiff had no title? In such a case, the Court would probably direct the cause to stand over, that the devisee under the second will might be made a party. Here the heir says that he himself, though heir, is entitled as devisee,—that the descent is broken, and that the question of intestacy does not arise. Suppose that the case stood there,—it would not be within the common rule, which is, that the heir, not admitting the will, is entitled to an issue *devisavit vel*

(a) 4 M. & Cr. 449.

 1843.—Whitaker v. Newman.

non. I do not see why, in such a case, the heir-at-law should be entitled to the issue. If he admits that the descent is broken, and that some person will take, not as heir, but as devisee, [*304] it appears to me to be taken out of the general rule under which the right of the heir-at-law to an issue arises.

Under these circumstances, the heir-at-law now stands before the Court in the same situation as any other Defendant, claiming as a devisee under a second will. If the Plaintiff had simply proved the due execution of the will, I should have no doubt of the way in which it would be proper to deal with the case: I should have said, that such proof was sufficient against the heir-at-law not disputing the will, and raising no issue on the question of there being a devise by which the descent was broken.

The question then arises, whether, if the heir-at-law had given any evidence of the existence of the alleged subsequent will, and of its destruction, so that the second devise could not take effect,—that might not have raised a case for inquiry, to shew that there was an intestacy,—not under the common rule, applicable to a mere heir-at-law,—but under the rule which would apply to any other Defendant, who might have made such a case. The heir, however, only says this—that he is informed and believes that another will was made, giving the estate to him, but that some child had burnt, and thereby destroyed it. He does not say how that fact became known to him, nor that he has any means of knowing what the contents of the alleged will were. He does not give me the slightest fact by which to try the question. If the Plaintiff had proved the first will per testes, I should certainly have said, not only that the heir was not entitled, as a matter of course, to an issue, but that there was no case to try. The difficulty is, that the Plaintiff himself has made the statement of the Defendant evidence. He

has read the statement from the answer, and made it the [*305] same thing as if the Defendant had given evidence of these facts; and the Court is bound to act upon it, so far as it is deserving of regard.

I confess that this case seems to me to stand in the same position as if there were no evidence whatever of the alleged second will.

 1843.—*Barkley v. Lord Reay.*

The case, in that respect, is so vague, loose, and unmeaning in assertion, that I cannot possibly infer from it, that any inquiry I might direct would not be perfectly useless. It seems to me to be equivalent to say, "I admit the will to have been duly executed; but if you direct an issue, I believe that I can prove circumstances invalidating the devise." If I am right in treating the heir-at-law as, in this case, standing not in a different situation from a stranger, —I think that a party who so frames his defence, as to afford no ground for believing that the issue or inquiry he asks would lead to any useful result, has no right to complain if the Court refuses to give him such issue or inquiry.

It is an important point of practice,—I have considered it very much since the case was first before me, and I have taken the best means of informing myself upon it. I do not think that I ought to make a different decree from that which was made on the former hearing.

 *BARKLEY v. LORD REAY.

[*306]

1843 : 27th January.

In a suit against the trustees of real estate having the legal fee, and full powers of sale,—the object being to raise a legacy charged on such estate,—the equitable tenant in tail thereof is a necessary party, and it is not sufficient to serve him with a copy of the bill under the 23rd Order of August, 1841.

ROBERT HOME GORDON, by his will dated in 1812, devised his real and personal estate in *Jamaica* to the Defendant Lord *Reay* and others, upon trust by sale or mortgage of all or any part thereof, to levy, raise and pay so much of his debts (except mortgage debts) and his funeral and testamentary expenses, and the legacies thereafter bequeathed, as his other real and personal estate therein mentioned should not be sufficient to pay, and also upon trust to pay certain annuities; and, subject to such trusts, the testator directed that his trustees should permit *Susan Harriet Hope* to receive the rents, profits and produce of the said real and personal estate for

 1843.—*Barkley v. Lord Reay*.

her life, and after her decease levy, raise and pay certain other annuities therein mentioned; and upon further trust, within six months after the death of *Susan Harriet Hope*, to levy, raise and pay the sum of 5000*l.* unto his cousin *George Home Murray*; and, subject to such trusts, the testator directed that his trustees should, after the decease of the said *Susan Harriet Hope*, convey and assure all such part or parts of the said real and personal estate in *Jamaica* as should not have been sold for any of the said purposes, to the use of Sir *Oxford Gordon* and his assigns during his life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, and remainder to the use of his first and other son and sons successively in tail male, according to their priority of birth, with divers remainders over: and the testator declared, that the receipts of the trustees, or the survivor of them, should be good and sufficient discharges to the purchasers or [*307] mortgagees of any parts of the said real and personal estate in *Jamaica*; and he afterwards bequeathed several other legacies. The testator died in 1826: the will was proved by Lord *Reay*. *George Home Murray* died in 1833, and bequeathed his legacy of 5000*l.* to the Plaintiffs, whom he appointed his executrixes. *Susan Harriet Hope* died in July, 1839. The bill was filed against Lord *Reay*, the surviving trustee, in whom the whole legal fee of the *Jamaica* estate had become vested, Sir *Oxford Gordon*, the equitable tenant for life, and his eldest son, *William Home Gordon*, the equitable tenant in tail of the same estate, and *Margaret Mackenzie*, an annuitant under the will, praying that the legacy of £000*l.*, together with the other legacies and annuities charged on the *Jamaica* estate, might be paid out of the assets of the testator received by Lord *Reay*, or that it might be raised and paid by sale or mortgage thereof, and that the necessary accounts might be taken and a receiver appointed. The bill also prayed, under the Order XXIII, of August, 1841, that *William Home Gordon* and *Margaret Mackenzie* might, upon being served with copies of the bill, be bound by all proceedings in the cause.

The answer of Lord *Reay* stated that he did not know whether the Plaintiffs were or not the representatives of *George Home Murray*,

 1843.—*Barkley v. Lord Reay.*

the legatee, but admitted that no part of the 5000*l.* or interest thereon had been raised or paid to the Plaintiffs, and stated the course which had been adopted in the management of the estate, and that, in the year ending in May, 1840, there was a balance of 184*l.* of the produce of the estate after payment of the expenses: in the year ending May, 1841, the balance of the expenses beyond the produce amounted to 2920*l.*, and that he believed the produce of the year 1842 would be greatly insufficient to pay the charges and outgoings, and that at the end of the year [*308] there would be a large balance against the estate. The Defendant said that he believed the 5000*l.* could not, in the depreciated condition of property in *Jamaica*, be raised by mortgage thereon, and he did not consider it prudent to sell the estate for the purpose of raising it.

The Plaintiffs moved for a receiver.

Mr. *Roupell* and Mr. *Finelly*, for the motion, and Mr. *Sharpe* and Mr. *James Parker*, contra.—*Dubless v. Flint (a)*, *Dawson v. Yates (b)*, were cited.

Receiver of a *West India* estate applied for by one of the parties entitled to a charge thereon, against the trustee, refused, notwithstanding the estate was depreciated in value, incumbrances thereon were increasing,—the management of the trustee not appearing to be improper.

THE VICE-CHANCELLOR refused the motion, observing that there was no evidence of any improper management of the estate, and nothing to shew that the appointment of a receiver or other consignee would probably be attended with any benefit to the estate. The bill in fact did not ascribe any mismanagement to Lord *Reay*, and the Court would not, at the instance of one of several parties interested in an estate, displace a competent trustee, or take the possession from him, unless he wilfully or ignorantly permitted the property to be placed in a state of insecurity, which due care or conduct would have prevented.

(a) 4 Myl. & Cr. 502.

(b) 1 Beav. 301.

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The Defendant *William Home Gordon* was served with a copy of the bill, under the Order XXIII, of August 1841, and upon proof of such service and affidavit that the bill sought no account, payment, conveyance, or other direct relief against him, the mem-
 [*309] orandum *of service under the Order XXIV, of August 1841, was ordered to be entered, and the same was entered accordingly.

The Defendant *Margaret Mackenzie* appeared gratis, and obtained an order for time to answer. On a motion to discharge this order, the *Vice-Chancellor* held that a Defendant, against whom no subpoena to appear and answer was prayed, but against whom the prayer was that, upon service of a copy of the Bill, he might be bound, was at liberty to appear gratis either before or after such service.

At the hearing, Mr. *Roupell*, for the Plaintiff.

Mr. *Teed* objected that *William Home Gordon*, the tenant in tail of the *Jamaica* estate, of which it was an object of the bill to obtain a sale, should be a substantial party, and that it was not sufficient to serve him with the copy of the bill.

Mr. *Roupell* and Mr. *Finelly*, in reply :—

The whole legal estate, and the power to give receipts for the purchase-money, is in Lord *Reay*. There is no direct relief sought against *William Home Gordon*. All that the bill seeks is a severance of the Plaintiffs' interest in the estate from that of the tenants for life and in tail. In this respect it is the same as one of several residuary legatees suing an executor and serving the other residuary legatees with copies of the bill ; they only seek a separa-
 [*310] tion of their interests, and that is a case clearly *within the Order.

VICE-CHANCELLOR :—

The substantial purpose of the suit is to sell the settled estate, and that is direct relief against the tenant in tail, although the prayer may not express it in terms. The 23rd Order was not intended to

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apply to such a case. The object of the Order was to relieve suitors from the necessity of having numerous parties in the same interest, against whom no relief is prayed, uselessly appearing in the cause.

LIBERTY to amend by adding parties.

WHITAKER v. WRIGHT.

18th, 27th, and 31st January.

A court of equity restrains a creditor from enforcing his legal rights against the estate of his deceased debtor only upon the principle, that the creditor is enabled to bring into equity (with some specified exceptions) all his legal rights, and that the validity of his debt must be determined in equity upon the same principles as at law; and the circumstance, that the creditor is also the Plaintiff in the cause, is not material as to the mode of determining the validity of such debt.

In the proof of a bond debt, before the Master, it is not the practice to require an affidavit of the consideration, unless a case of suspicion against the bond is raised. Under a decree in a suit by a bond creditor on behalf of himself and the other creditors on the estate, the executor may, in the Master's office, impeach the validity of the bond upon grounds which were not in issue in the cause at the hearing.

THIS was a creditor's suit, instituted, in 1838, by *William Whitaker* (and afterwards revived by his executors) against the personal representatives of *Strethill Wright*, the younger, seeking payment of a debt alleged to be due on a bond, dated the 10th of February, 1817, whereby *P. W. Dunville*, therein described as the principal debtor, and *S. Wright*, and the said *Strethill Wright*, the younger, became jointly and severally bound to the said *William Whitaker* in the sum of 1,800*l.*, with a condition making void the same on payment to him of 900*l.*, and lawful interest, on the 10th of November then next. The bill stated, that after deducting certain dividends on the debt received under the "bankruptcies of *Wright*, the [*311] elder, and *Dunville*, the sum of 835*l.* still remained due on the bond.

The Defendants, by their answer, not admitting the debt, the
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Plaintiffs examined *J. Roscoe*, the attending witness, and proved the bond. The Defendants exhibited cross-interrogatories, and examined *J. Roscoe* as to the consideration for the bond.

At the hearing, the Defendants insisted that the effect of the evidence was to shew that the transaction had been usurious, and that a part of the alleged consideration had been returned to *Whitaker* by way of bonus. The Plaintiffs contended that, no issue on this point having been raised on the pleadings, the evidence directed to it could not be taken into consideration, and that any payment to *Whitaker* was at the utmost nothing more than an item in the account of the debt which was to be taken: *Walker v. Woodward* (a). The evidence was entered as read (b), and the common decree in the suit of a specialty creditor was made.

The Master by his report stated the charge carried in by the Plaintiffs of the sum alleged to be due for principal and interest on the bond, and also the contents of the bond, and that a state of facts and countercharge had been laid before him by the Defendants, wherein it was alleged that no good or sufficient consideration passed between the parties for giving such bond, but that such bond was made and executed to cover an usurious transaction between *William Whitaker* and *P. W. Dumville*, and that the Plaintiffs ought to prove the consideration, and that the bond is in fact

[*312] "void under the provisions of the statutes respecting usury, and that in support of such counter state of facts and charge the deposition of the said *J. Roscoe* had been produced and read; and on consideration of such charges, and of the evidences laid before him in support thereof respectively, he was of opinion that there was sufficient ground for calling on the Plaintiffs to prove the consideration of the bond, and he accordingly requested them so to do; and the Plaintiffs having declined so to do, he had not thought fit to allow the charge so brought in by them as a debt against the estate of *Strethill Wright* the younger, until the consid-

(a) 1 Russ. 107.

(b) See observations on the case of *Walker v. Woodward*; and on the rule as to the entering of evidence relating to the particulars of an account, 1 Hare, 245—6.

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eration of such bond should have been so proved as aforesaid, and no other debt having been claimed before him in consequence of the advertisement, he had not thought it necessary to proceed to take the accounts directed to be taken by the said decree.

The Plaintiffs excepted to the report, on the ground that they ought not to be required to prove the consideration.

Mr. Romilly and Mr. Follett, for the Plaintiffs, cited *Rundell v. Lord Rivers* (a), *Hill v. Montagu* (b), *Nichols v. Lee* (c).

Mr. Temple and Mr. Elmsley, for the representatives of the obligor, mentioned *Owens v. Dickenson* (d), *Ferrall v. Shaen* (e).

VICE-CHANCELLOR:—

The bill is filed by a Plaintiff claiming to be a bond-creditor, on behalf of all the creditors of the obligor. [*313] No issue, impeaching the bond on the ground of usury, any other ground which has been since the subject of contest, was tendered by the answer of the representatives of the obligor; but, in the cross-examination of the attesting witness to the bond, some evidence was given by him, which the Master has since thought raised a suspicion against its validity. The decree made was nothing more than that which is usual in a creditor's suit; and the evidence, therefore, having no effect on the decree, the formal admission of it was not objected to on the part of the Plaintiff, and it was accordingly received. The cause, when in the Master's office, assumed a different aspect; for the Defendants, representing the debtor doing that which it is not disputed in this case they had a right to do, have endeavoured to shew that the bond was founded upon an usurious contract or consideration; and have, by their state of facts, raised a question in the office, which was not on the pleadings before the Court. The Defendants gave in evidence the cross-examination, which had been previously read in the cause, but which could not

(a) 1 Phillips, 88.

(b) 2 Man. & Sel. 377.

(c) 3 Anstr. 240.

(d) Cr. & Ph. 48.

(e) 1 Wms. Saund. 294.

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then be noticed, inasmuch as it did not apply to any question in issue on the pleadings. The Master has not reported either for or against the bond; he has only refused to allow the debt against the estate until the consideration should be proved; and, in this state, the case comes before me.

Two points were suggested in argument before me,—one was, as to the effect of the decree,—the other, as to what was the duty of the Master in the investigation of the case, as distinct from the question of the form of the decree.

With respect to the form of a decree in a creditors' [*314] suit,—the Court does not treat the decree as "conclusive proof of the debt. It is clear, that it is not so treated for all purposes; for any other creditor may challenge the debt, *Owens v. Dickenson* (a); and it is equally clear, that in practice, the executor himself is allowed to impeach it. If, in a case where the plaintiff sues on behalf of himself and all the other creditors, and the defendants, who represent the estate, do not admit assets (b), it is objected, at the hearing, that the debt is not well proved,—the Court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plaintiff to go in to the Master's office; and a new case may be made in the Master's office, and new evidence may be there tendered. The real question is, in what way the new case is to be tried, or what is the course to be pursued in the Master's office? The Plaintiff says that the course should be the same as at law, and that he brings his legal rights with him into equity; and, subject to some qualification, I cannot refuse my assent to the Plaintiff's proposition. When a decree is made in a creditor's suit, under which all the creditors may come in, this Court will not permit the estate to be embarrassed by proceedings which might conflict with each other, to the prejudice of the executor or administrator, *Perry v. Phelps* (c); but nothing would be more unjust than that the Court should restrain the creditor from

(a) 1 Cr. & Ph. 48.

(b) See *Woodgate v. Field*, ante, p. 311.

(c) 10 Ves. 34.

 1848.—Whimker v. Weight.

proceeding to enforce his rights at law, except upon the principle of allowing him to bring his legal rights with him into the office of the Court, which it substitutes for proceedings at law, *Dornford v. Dornford* (a); *Berrington v. Evans* (b); and the circumstance, that the creditor is also the Plaintiff in the suit in equity, *makes no difference in that respect. The only quali- [*315] fications which now occur to me of the general rule, that a legal creditor brings all his legal rights with him, are founded, first, upon the circumstance, that, in certain special cases, a court of equity, in the ordinary course of administering assets, will distinguish a voluntary bond from one given for value, *Lady Cox's case* (c); *Jones v. Powell* (d); *Gilham v. Locke* (e); *Assignees of Gardiner v. Shannon* (g); and, secondly, that, in all cases, this Court requires an affidavit of the truth of the debt from the creditor, which at law is not required. This affidavit is required to extend to the consideration of a simple-contract debt,—but not to the consideration of bond or other specialty debts. The third qualification,—if, indeed, there be any other than those which I have mentioned,—is that which is said to be introduced by the case of *Rundell v. Lord Rivers* (h).

I have only to direct my attention to the second and third of these qualifications; and, on the second, I will only observe, that the affidavit is not required or received as evidence of the demand, but only to repel the possible implication that the creditor may be demanding that which he knows is not due. Admitting that a party suing in equity must take his remedies according to the practice of a court of equity, I am not aware of anything by which the legal rights of a legal creditor can be affected by the nature of his equitable remedies, except in the way which I have noticed, and that which is said to be decided in *Rundell v. Lord Rivers*.

The case of *Rundell v. Lord Rivers* is exactly the converse of that which is now before me. In this case, *the [*316] Master has refused to allow the debt until the creditor has

(a) 12 Ves. 127.

(c) 3 P. Wms. 339.

(e) 9 Ves. 612.

(h) Phillips, 88.

(b) 1 You. 276.

(d) Eq. Cas. Abr. 84, pl. 2.

(g) 2 Sch. & Lef. 228.

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done something more than he has already done. In *Rundell v. Lord Rivers* the Master had admitted the debt; and it is very material to observe, that, without an examination of the five reasons which are assigned for complaining of the Master's certificate, (and which are stated in a report of the case in the *Law Journal* (a)), the effect of the *Lord Chancellor's* reasoning will not be satisfactorily collected. That was the case of a creditors' suit to administer the estate of Sir W. Rumbold, in which there was the usual decree. The plaintiffs were creditors whose interest it was to exclude other creditors from participating in the estate. The Master found in favour of certain debts,—two of which formed the subject of the exceptions. One of the objections taken was, that the Master had not required the parties to make affidavit as to the consideration, which, in the case of a simple-contract debt, is clearly required, but is not generally required, in the first instance, in the case of a bond. Upon that, the *Lord Chancellor* sent an inquiry to the Masters of the practice in their offices in this respect, in the case of a charge being brought in for a bond debt. Eight of the Masters, in reply, certified, that it was not the practice, in their offices, to require that the affidavit of debt should state the consideration for which the bond was given, as in the case of simple-contract debts; and that it was sufficient for the affidavit to state that the deceased was indebted in so much money upon the bond; and they further stated, that, if a bond were not twenty years old, they required the execution of it to be proved in the regular way; and that, when a case of suspicion was raised as to the consideration, they then inquired into the validity of the bond.

[*317] *Now I do not understand the Masters to say by this certificate, that they do *ex officio* institute proceedings to inquire into the validity of the bond; but that, having litigating parties before them, they will, at the instance of any of those parties, enter into a consideration of that question; and when the case is examined, it will be found that that was the very question raised. The Masters do not give any opinion as to the party where the onus

(a) Vol. 20, (11 N. S.). Chanc., p. 27.

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is, or what is the form of the proceedings,—they only say they will inquire into the validity of the bond. The *Lord Chancellor*, in afterwards giving judgment on the case, adopted the rule of practice laid down in the certificate, and said, that the question which remained to be considered was, whether, upon the evidence which had been adduced before the Master, the case was one of such suspicion as to have made it incumbent upon him, according to that rule, to inquire into the consideration for which the bond had been given. The case, as it appears in *Turner & Phillip's Reports (a)*, only shews that the *Lord Chancellor* considered the rule observed by the Master to be a sound rule, giving no opinion as to the course to be taken; not even whether as regards the creditor himself, more was to be done than to require the affidavit, as in the case of simple-contract debts. By the report in the *Law Journal* it appears that there were two exceptions as to the admission of two bond debts, and the exceptants assigned at the foot of the exceptions five reasons why the certificate was erroneous: first, that the affidavit in support of the claims in respect of the bond debts did not state the consideration; secondly, that the Master had received the affidavits of the creditors in support of their claims, as evidence that the bond debts were due to the respective parties, and that no other evidence was submitted to him; thirdly, that the Master [*318] had allowed the debts without any, or at least without proper or sufficient evidence having been furnished to him, that any valuable or other consideration was given by the creditors for their respective bond debts; fourthly, that the Master, when applied to for that purpose, had refused to settle the draft interrogatories for the examination of the creditors, or to allow them to be examined on interrogatories or otherwise; and fifthly, that the Master had received the affidavit of the attesting witness of the bond, although objected to, and had refused to require the execution of it by the testator to be proved by the attesting witness, on a viva voce examination, whereby the Plaintiffs had been deprived of the benefit of a cross-examination of such attesting witness.

(a) Page 88.

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It appears therefore, that the turn which the case of *Rundell v. Lord Rivers* took in the Master's office was this,—the Plaintiff, who as creditors were interested in opposing the claims upon the bonds, carried in a state of facts, impugning the consideration for them, as being founded on stock-jobbing transactions, and taking upon themselves the onus of proving their case. They claimed the right to verify their state of facts, in order to displace the claims upon the bonds, and they carried in interrogatories for the examination of the parties: the parties resisting the bonds, therefore, were exhibiting proceedings in the nature of pleadings, to impeach the bond; and the Master decided that they could not do so. The only question the *Lord Chancellor* had to determine (except a question of form) was, whether this conclusion of the Master was right. The *Lord Chancellor* was of opinion that the rule of practice laid down in the certificate of the Masters was right, but an expression attributed to him in the report of his judgment in the *Law* [*319] *Journal* appears to me to have embarrassed the case.

The passage I refer to is this: "It is certified by the Masters that in their offices, where a reasonable case of suspicion is raised, it is a matter of course for the Master to require the party proving the bond to establish its validity by proving the consideration, and there can be no doubt that that is the proper principle; and the question, therefore, in this case is, on the affidavits, whether a reasonable case of suspicion is made out, so as to call upon the Master in exercise of a fair discretion to have required proof of the consideration of this bond."

Now, I cannot help thinking that the language used by the *Lord Chancellor* on this point has been mis-apprehended. The Masters in truth did not certify to the effect which is stated in the passage I have referred to. I do not doubt that the *Lord Chancellor* meant to say, and said, that it was discretionary in the Master to require the claimant to prove the consideration; but I doubt whether the *Lord Chancellor*, having no such point to decide, did mean to decide, as an abstract proposition, that the onus was in all cases thrown upon the claimants to prove the consideration, or whether he meant to say more than this,—that, where a case of suspicion was raised,

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the same thing must be done with respect to a bond debt as with respect to a simple-contract debt; namely, that the creditor should, by his affidavit, aver consideration; leaving to the other side the onus of impeaching the bond upon other grounds.

I should observe, that the *Lord Chancellor*, according to the report, after going through the facts, which shewed a case of suspicion, goes on to say that he will not decide by anticipation what course is to be taken in the Master's office. It is manifest, therefore, that the *Lord Chancellor* did not mean to decide more than this; that the Master, who had admitted the bond debts as good, 'refusing the opposite party the opportunity of impugning [*320] them, had miscarried in his judgment. The *Lord Chancellor* decided nothing on the nature or effect of the evidence to be given,—as to which party should be called on to give evidence,—or on the course of the investigation. He decided only that the Master should have entertained the question, exercising his discretion in calling on the creditor to give, where the creditor is in a condition to do so, such evidence of the consideration of his debt as may be necessary to repel any adverse implication arising out of the case, as well in respect of debts on bond as by simple contract. I do not understand the *Lord Chancellor* as deciding abstractedly that the validity of a debt in equity is to be investigated upon principles different from that which would govern the right at law, or in a different manner.

In the case before me, the Master, proceeding upon the language of the Judgment in *Rundell v. Lord Rivers*, required some proof to be given of the consideration, the creditor not suggesting any difficulty in giving it, but simply refusing to do so. The Master having required him to do something more than he had done, the Plaintiffs have at once concluded, that, in consequence of the evidence elicited by the cross-examination of the attesting witness, the Master would throw upon the obligee the onus of proving a negative, and of shewing that the consideration of the bond was not usurious. I have the Master's authority for saying that he had no such intention, and that he had decided only, upon the authority of

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Rundell v. Lord Rivers, that he was bound to ascertain the validity of the bond, not deciding what the creditor should do.

Without attempting to define the limits of the discretion given to the Master, and not admitting the conclusion that *Rundell v. Lord Rivers* has reversed the legal position of the parties, or that such position is in fact altered, I am forced in this case to send the cause back again to the Master; for if I were to allow the exceptions, the case must go again to the Master, in order that the Defendants might have an opportunity of making that defence to the bond which they have not hitherto been called upon to make, in consequence of the Master having required something more of the Plaintiffs. If I overrule the exceptions, I must also remit the case back to the Master, for he is not decided that the bond may not constitute a good charge against the estate.

REMIT the case to the Master to review his report (not allowing the exception), and reserve the costs.

1843: May 27th.

A witness, called by the Plaintiff, and cross-examined by the Defendant before the hearing, on a point not then in issue in the cause allowed to be examined again by the Defendant on the same issue, when raised before the Master under the decree.^[1]

Mr. *Elmsley* moved, on behalf of the Defendants, that *J. Roscoe*, a witness already examined in the cause for the Plaintiffs and Defendants respectively, might be examined as a witness for the Defendants under the decree, to any matters to which he had not been before examined, and that it might be referred to the Master to settle the interrogatories: *Vaughan v. Loyd (a)*.

Mr. *Romilly* and Mr. *Follett* for the Plaintiffs, insisted that a further examination of the witness would be open to all the objections against which the Court was studious to guard, and always looked

(a) 1 Cox, 312.

[1] See *Cass v. Cass*, 4 Beavan. 277.

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upon as extremely dangerous (a), by affording an opportunity for amending the testimony, after it was "known [322] where the weakness of the case lay (b). In this case, the interrogatories on which the witness was examined were directly to the point in question,—the consideration of the bond; and the evidence was read at the hearing, and though it was ineffectual then (which was material to the principle now insisted upon), yet it was used before the Master. The Defendants ought to be allowed, after the case had been discussed before the Court and the Master, thus to supply any deficiency in their proof: *Bott v. Birch* (c); *Swinford v. Horne* (d); *Asbee v. Shipley* (e); *Jones v. Thomas* (g); *Willan v. Willan* (h); *Winpenny v. Courtney* (i). It is always necessary that a very special case should be made for the re-examination, shewing distinctly what are the new matters to which the witness is called to dispose; *Hood v. Plumm* (k).

 VICE-CHANCELLOR:—

If I accede to the Defendants' notice, I am satisfied that under the peculiar circumstances of this case, regard being had to the discussions which took place, and the opinion I expressed when the cause was last before me, the Plaintiffs practically, will incur all the dangers against which the rule of the Court, prohibiting the re-examination under a decree of a witness previously examined to the same matter, is designed to guard. If, on the other hand, I refuse the application altogether, and bind the Defendants by the evidence already given by the attesting witness to the bond, I am satisfied I shall be applying that rule to a case distinguish- [323] able from those in which it has hitherto been applied, and that I may be doing injustice to the Defendants.

The rule which prohibits the re-examination of a witness after de-

(a) Per Lord Cottenham, *Stanney v. Walmsly*, 1 Myl. & Cr. 366.

(b) Per Sir J. Leach, M. R., *Rowley v. Adams*, 1 Myl. & K. 545.

(c) 5 Madd. 66.

(d) Id. 379.

(e) Id. 467.

(g) 3 Y. & C. 455.

(h) 19 Ves. 590.

(i) 5 Sim. 554.

(k) 4 Sim. 101.

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cree to the same matter to which he was examined before the decree, does not apply where the witness is called after the hearing, not by the same party who examined him before the hearing, but by the opposite party: *Metford v. Peters* (a). In this case, the witness was called by the Plaintiffs, and was cross-examined by the Defendants. The point to which he was cross-examined, namely, the supposed usurious consideration for the bonds, were not pleaded, and could not therefore be the subject of discussion or consideration at the hearing; but the evidence in chief and cross-examination together were entered in the decree without objection.

Upon the decree, the practice of the Court allows the defendant to make a new and distinct case before the Master, a practice which, though very intelligible as regards persons who had no opportunity of combating the plaintiff's claim before the hearing (*Owens v Dickenson* (b)), is by no means satisfactory to my mind as regards a defendant who, as in this case, had then the opportunity of resisting the plaintiff's right to a decree, if he had grounds for doing so. The result, however, is, that the Defendants have raised in the Master's office an issue not raised before; and the question is, whether I can refuse them, under proper safeguards, an opportunity of examining an important witness only because they irregularly cross-examined the Plaintiff's witness in a stage of the cause where there was no issue to which the evidence given upon the cross-examination was applicable?

The rule laid down in *Willan v. Willan* (c), shewing that after publication of the evidence in the Master's office in support of a state of facts, a party cannot examine new witnesses, I would gladly in this case give the Plaintiffs the benefit of, if the proceeding in the Master's office had been so conducted as to enable me to see that I was merely applying that rule. But I am satisfied that I should be unduly straining that rule if I were to bind the Defendants by it in the present cause.

The question then is, under what restrictions—for I have no doubt of my right to impose such restrictions as the interests of justice may

(a) 8 Sim. 680.

(b) Cr. & Ph. 48.

(c) 19 Ves. 590.

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appear to require—under what restrictions ought the examination of the attesting witness to the bond to be allowed. If this were the hearing of the cause, and the difficulties which now appear were present to my mind, unless the Plaintiffs elected to go into the office, subject to the disadvantages of that course of proceeding, I should probably think it right to retain the bill, giving them leave to bring an action upon the bond, and that probably is the only course by which the justice of the case can be adequately secured. As that course, however, is not now open to me in point of form, I can only direct the examination of the witness, the Master to settle the interrogatories.

If, however, the Plaintiffs think a trial at law is necessary to the protection of their interests, and think proper to rehear the cause, they will find me—subject to any argument the [*325] Defendants may adduce against it—strongly disposed to take that course at the hearing, which I have already said I think the safest course under all the circumstances of the case: *Earle v. Pickin* (a). Or, for the purpose of so determining the question, the Defendants might waive the form of a rehearing, and argue the propriety of such a decision.

Mr. Romilly suggested that the order must be limited to the terms of the notice of motion, and not extend to a general examination.

The order was made in the terms of the notice of the motion.

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[*326]

1843: 15th, 16th, 17th, 18th, and 24th February.

Under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land, whose mortgage debt and interest are secured also by a bond or covenant, is entitled in a foreclosure suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt, within twenty years before the institution of the suit.

The price of redeeming the mortgaged premises is the same in a suit by the mort-

(a) 4 B. & Myl. 547.

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gagor to redeem as it would be in the like circumstances in a suit by the mortgagee to foreclosure.

If the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrear of interest, *semble*.

A BILL of foreclosure. In 1787, *W. Hurst* borrowed 1,100*l.* of *Sarah Palmer*, for which he gave his bond, dated the 9th of March, 1787, binding himself, his heirs, executors and administrators in the penal sum of 2,200*l.*, conditioned for the repayment of the 1,100*l.* and interest, as therein mentioned, unto the said *Sarah Palmer*, her executors, administrators or assigns; and by indentures of lease and release, dated the 8th and 9th of March, 1787, *W. Hurst* conveyed certain lands in the county of *Glamorgan* to *Sarah Palmer*, her heirs and assigns, in fee, as a collateral security for the payment of the said 1,100*l.* and interest, with a proviso for redemption on payment thereof, and a covenant by the mortgagor, for himself, his heirs, executors and administrators, to pay the same.

On the marriage of *Sarah Palmer* with *R. Hurst*, in 1789, the mortgage-money was settled to the use of the husband for life, with remainder to the use of the wife for life, remainder as she should appoint; and the estate was vested in *Bengough* and others as trustees of the settlement, subject to the proviso for redemption. *Sarah Hurst* survived her husband, and died in 1802, having appointed the mortgage-money to *Tickell* and another, in trust for her daughter, the Comtesse *De L'Age*, for her life, for her separate use, with remainder to her children. The Comtesse *De L'Age* died in January, 1826, leaving her husband (who obtained letters of administration to her estate) and two daughters, namely, the Plaintiff, the

Vicomtesse *Du Vigier* (who attained twenty-one years [*327] of age in April, 1826), and *Maria *Sophia De L'Age*.

Maria Sophia De L'Age died in October, 1826, having bequeathed her interest in the mortgage-money to *Sophia Foucault De L'Age* and *Emilia De L'Age*, and appointed her father, the Comte *De L'Age*, her executor. The Comte *De L'Age* died in July, 1831, and the Plaintiff *J. S. Gregory*, as the attorney of the Vicomtesse *Du Vigier*, procured letters of administration de bonis non of the effects of *Maria Sophia De L'Age*.

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The equity of redemption of the mortgaged estate became vested by devise in the Defendants *E. H. Lee* and *H. T. Lee*, subject to certain annuities. In July, 1825, the interest being in arrear, the then owner of the estate paid to the Comtesse *De L'Age* the sum of 800*l.* on account of such interest.

The bill was filed the 21st of October, 1837, by the Vicomtesse *Du Vigier* and her husband, and the administrator de bonis non of the deceased sister, *Maria Sophia De L'Age*, against *E. H. Lee* and *H. T. Lee*, the devisees,—and the annuitants, under the will of *H. Lee*,—the heir-at-law of *Bengough*, in whom the legal estate in the mortgaged premises was vested.—the executor of *Tickell*, the surviving trustee of the mortgage-money,—and the legatees of *Maria Sophia De L'Age* (who were out of the jurisdiction). The bill alleged that in July, 1826, a further arrear of interest, amounting to 427*l.* 6*s.* 8*d.*, was due upon the mortgage, making, together with the principal, the sum of 1,527*l.* 6*s.* 8*d.*, and that a negotiation then took place, and indentures were prepared and executed by some of the parties for reconveying the estate upon payment of that sum, but the arrangement was not completed. The bill alleged that the whole of the said sum of 1,527*l.* 6*s.* 8*d.* and the interest thereof, or of the said 1,100*l.*, and the interest "due in July, 1826, and which had since accrued [*328] due still remained unpaid, and that the mortgaged premises ought not to be redeemed except upon payment thereof.

The bill prayed that the said sum of 1,527*l.* 6*s.* 8*d.* and the interest thereof, or such other principal sum and interest as to the Court should seem fit, might be declared to constitute a charge upon the mortgaged premises, and that an account might be taken of what was due and owing to the Plaintiffs upon the security of the mortgage and bond, and that the Defendants *E. H. Lee* and *H. T. Lee*, or the other Defendants, the annuitants, or one of them, might be decreed to pay to the Plaintiffs what should appear to be due on taking of such account, and costs of the suit; and that in default of such payment, *E. H. Lee* and *H. T. Lee* (and the annuitants) and all persons claiming by, from, through or under them, might be barred and foreclosed of all right and equity of redemption

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of and in the mortgaged premises, and might deliver up all deeds and evidences relating to the same.

There was no evidence in the cause of any payment of interest on the mortgage after the month of August, 1825; but some letters were proved for the purpose of shewing a subsequent acknowledgment of the debt and interest by the mortgagors or their agents.

Mr. Bazalgette and Mr. Romilly, for the Plaintiffs.

The mortgagee is entitled to foreclose, unless he be paid the principal of his mortgage and the whole interest which is due to him thereon, not exceeding twenty years back; for his debt and interest are secured by the bond and covenant of the mortgagor, and the right to "recover specialty debts for [*329] that period is expressly saved by the Statute 3 & 4 Will.

4, c. 42, s. 3 (a). The form of this mortgage, moreover, makes it only collateral security for the debt, which is purely a debt on bond, and is not therefore a charge on land within the meaning of the Statute 3 & 4 Will. 4, c. 27, s. 42 (b). Nor can it be accurately

(a) Sect. 3 enacts, "that all actions of debt for rent upon an indenture of demise; all actions of covenant or debt upon any bond or other specialty, and all actions of debt, or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the any time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits but not after; the said actions by the parties grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited."

(b) Sect. 42 enacts, "that, after the 31st of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent

1848.—*Du Vigier v. Lee.*

said (as in *Dearman v. Wyche* (a)) that a foreclosure suit is a suit to recover money. Whatever might be the [*330] case where there is no bond or covenant to secure the money, yet where, as in the present case, those specialties exist, the Court, to prevent circuity of action, will give effect to them in the same proceeding in which it deals with the mortgage,—no intervening interests of other parties appearing to interfere with such remedies of the mortgagee.

Mr. Tinney and Mr. Baily, for the Defendants entitled to the equity of redemption, argued, first, that a representative of the Comtesse De L'Age, the late tenant for life of the mortgage-money, was a necessary party in respect of the interest, if any, accruing in her lifetime. Secondly, that all remedy in this or any other form of proceeding directly against land in respect of more than six years' arrears of interest, was expressly excluded by the terms of the Statute 8 & 4 Will. 4, c. 27, s. 42. And lastly, that in the event of the right of the Plaintiffs being limited to six years, the costs of the suit were unnecessarily incurred, as the Defendants had in effect offered to pay such interest without suit.

The following cases were also cited on the construction of the statutes, in their bearing on the question of interest: *Doe d. Jones v. Williams* (b); *Paget v. Foley* (c); *Lord St. John v. Boughton* (d); *Hodges v. Croydon Canal Company* (e); *Mellish v. Brooks* (g); *Strachan v. Thomas* (h); *Holland v. Clark* (i). On the point of tacking the debt by specialty to the mortgage: *Adams v. Claxton* (k); *Ex parte Knott* (l), and the cases there mentioned. Several cases were also cited with reference to [*331] the effect of the letters, in taking the case out of the

or interest, shall be recovered by any distress, action, or suit, but within six year next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by whom the same was payable, or his agent."

(a) 9 Sim. 575.

(c) 2 Bing. N. C. 679.

(e) 3 Beav. 86.

(h) 12 Ad. & El. 586.

(k) 6 Ves. 226.

(b) 5 Ad. & El. 291.

(d) 9 Sim. 219.

(g) Id. 22.

(i) 1 Y. & C. C. 161.

(l) 11 Ves. 609.

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operation of the statutes of limitation; but the judgment did not proceed on this point.

VICE-CHANCELLOR:—

The questions which have been argued before me are, first, whether the suit is defective in not having before the Court a representative of the Comtesse *De L'Age*, who was entitled to such of the arrears of interest as accrued in her lifetime; secondly, how far back the account of interest on the mortgage-money is to be carried; and thirdly, whether any special direction should be given with regard to the costs of the suit. It is not necessary that I should give any opinion on the first question beyond this,—that the Court may, if otherwise proper, decree a foreclosure in the present state of the record. If the representative of the Comtesse *De L'Age* is a necessary party to the conveyance of the estate, or the discharge of the mortgagees, the Plaintiffs will be unable to make any decree effectual, which they may obtain without the concurrence of that party. I understand, however, that the Plaintiffs will be under no difficulty in this respect.

On the second question, with respect to the arrears of interest which can be claimed by the mortgagee, the argument on behalf of those who now claim the interest of the mortgagor in the equity of redemption was, that under the Statute 3 & 4 Will. 4, c. 27, s. 42, no more than six years' interest could be claimed by the mortgagee. The mortgagee, on the other hand, contended that, consistently with that Statute, or at all events by force of the Statute [*382] 3 & 4 Will. 4, c. 42, s. 3, and according to the established principles of equity, he is entitled to carry back the interest account under the mortgage, so as to entitle him to charge that security with whatever interest he could recover upon the bond.

In considering the Statute 3 & 4 Will. 4, c. 27, I admit to the fullest extent my obligation to collect the intent of the legislature in passing that act from the act itself; but having before me what I cannot but regard as legislative declarations that that act, standing

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alone, does not with perfect accuracy express the object of the legislature in passing it, I am bound to scan its provisions with the utmost care, if, in any case, those provisions are in apparent conflict with the ordinary principles upon which justice is administered. That the greatest care is necessary in construing the act, must, I think, be admitted by every one who has attended to its history. By the 2nd and 3rd sections, as interpreted by the Court of Queen's Bench (a), it was doubtful whether a mortgagee who abstained from entering upon a mortgaged estate for twenty-one years after it became forfeited would not be barred of his right of entry, although the interest had been regularly paid during the whole of that period. And a new act (7 Will. 4 & 1 Vict. c. 28) was passed to remedy the mischief to which mortgagees were thus exposed. Again, by the 42nd section of the Statute 3 & 4 Will. 4, c. 27, no interest upon money charged upon land could be recovered in any action or suit for more than six years, although the payment of such interest was secured by bond or covenant, or both. It was not that land alone could not be charged, leaving the personal remedies against the debtor open; but that the fact of the land being charged was, according to the letter of the act, a [*333] bar to the recovery of interest even upon the personal remedies for a longer period than six years. It never could have been intended, that because a creditor had security upon land, as well as by bond or covenant, his personal remedies against his debtor should on that account be impaired: and accordingly by the 3 & 4 Will. 4, c. 42, passed at a later period of the same session of Parliament, the right of the creditor to bring an action upon the bond or covenant was extended to or declared to exist for twenty years, notwithstanding the 42nd section of the 3 & 4 Will. 4, c. 27: *Paget v. Foley* (b); *Strachan v. Thomas* (c). The act which was passed the later of the two is made to come into operation before that which was passed earlier in the same session (d). Again, by the 3, & 4 Will. 4, c. 27, no provision, or at least no adequate provision is made for the interests of persons under disabilities, so far as the

(a) *Doe v. Williams*, 5 Ad. & El. 291.

(b) 2 Bing. N. C. 679.

(c) 12 Ad. & El. 554.

(d) See 3 & 4 Will. 4, c. 42, s. 44.

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interests of such persons may be affected by some of the clauses of that act. The interest of such persons, if adequately protected at all, are so by force of the 4th, 5th and 7th sections of the 3 & 4 Will. 4, c. 42. And without further pursuing the observations to which the statute 3 & 4 Will. 4, c. 27 is open, I may observe, that the proviso in the 42nd section in favour of mortgagees does not by any means adequately provide for the various cases for which, where there are several mortgagees upon the same estate, provision was necessary, and was obviously meant to be made.

I have noticed the above peculiarities in the statute 3 & 4 Will. 4, c. 27, in order to justify the extreme caution with which I have felt bound to examine its provisions as they bear on the case before me.

[*324] *Upon the merits of the case, it was faintly argued for the Plaintiffs, that a mortgage was not a charge upon land within the 3 & 4 Will. 4, c. 27, s. 42. To that argument I certainly shall give no weight. The word "charge" is large enough to include a mortgage; and a proviso in the same clause, saving the rights and interests of mortgagees in certain cases, is conclusive, if such evidence were wanting, to shew that mortgages were intended to be included under the word "charge." In fact, if the Plaintiffs' argument were well founded, it would exclude from the operation of the act mortgages for the discharge of which there was no security by bond or covenant, although such mortgages in truth might be charges upon the land exclusively, and nothing more.

It was also argued for the Plaintiffs that a foreclosure suit is not a suit for the recovery of money within the meaning of the 42nd section of 3 & 4 Will. 4, c. 27, for that the object of the suit was simply to foreclose the equity of redemption, and that the option of redeeming the estate was solely for the benefit of the mortgagor. This view of a foreclosure suit is opposed to that of the *Vice-Chancellor of England* in *Dearman v. Wyke* (a), and unless the 42nd section of the act is to become a dead letter as to mortgages, I confess the argument is opposed to my own opinion also. It is perfectly true, that a bill to redeem a mortgage (which was relied upon at

(a) 9 Sim. 570.

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the bar as furnishing an analogy for the present case) cannot, in any sense of the expression, be treated as a bill to recover money; and as a general proposition, I think the relative rights of mortgagor and mortgagee are the same in a bill to redeem as in a bill to foreclose, at least as to the price of "redeeming the [*335] mortgage. But the fallacy of the Plaintiffs' argument consists in assuming that, in a suit to redeem the mortgage, the Court would necessarily compel the mortgagor to pay all the arrears of interest, without reference to the statute 3 & 4 Will. 4, c. 27. I do not accede to that proposition. I think, that in order to determine the price of redemption upon a bill to redeem a mortgage, the Court ought to inquire what the terms of redemption would be in a suit to recover the mortgage-money out of or by means of the charge upon the land; and if, on the result of that inquiry, the Court should find that in a suit for foreclosure, or other suit seeking to affect the land, no more than six years' interest would be recoverable by the mortgagee, I think it would be bound to fix the same limit in determining the price of the redemption in a suit to redeem. So far I feel bound to reject, or at least not to found my judgment upon, the arguments which have been relied upon by the Plaintiffs.

For the purpose of my judgment, therefore, I shall assume that mortgages are charges upon land within the meaning of the 42nd section of the statute 3 & 4 Will. 4, c. 27, and that I must treat this as a suit to recover money charged upon land within the meaning of the same section of the act; and if the Plaintiff had no bond or other specialty for securing the payment of his debt,—if he had no security for his principal and interest other than the charge upon the land, the consideration of this case might possibly have ended in a declaration that the mortgage was redeemable upon payment of the principal monies and six years' interest. Notwithstanding the right of entry which the mortgagee might have, I do not understand the *Vice-Chancellor of England* in *Dearman v. Wyche* to have ruled anything inconsistent with this opinion. "The [*336] Plaintiffs' right of entry would remain to secure the principal money, and such interest as by law would be recoverable against

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the land. But if the right to interest is to be confined to six years by force of the statute 3 & 4 Will. 4, c. 27, s. 42, I apprehend that a court of equity would compel a reconveyance of the estate upon satisfaction of the mortgagee's demand to that extent. The expressions of the *Vice-Chancellor* in his judgment in *Dearman v. Wyche* do not point to the amount of interest recoverable under the mortgage. In that case the plea went to the whole bill, and he determined only, that if the mortgagee could recover in ejectment, such a plea was bad. This in effect was affirming only, that as the mortgagee could recover in ejectment, the mortgagor could not redeem the estate without paying something for it.

The question, in this case, is, how far the right to interest, which, if chargeable upon land only, might not extend beyond six years (notwithstanding the legal estate remaining in the mortgage), is enlarged by the circumstance that the mortgage-money is secured by specialty, which at all events as against the debtor personally, carries back the right to interest for twenty years?

By actual contract between the parties, the interest is recoverable at least for a period of twenty years, as well against the land itself as against the person of the debtor. By the statute 3 & 4 Will. 4, c. 27, s. 42, according to the literal import of the words, this right is limited to six years, as well against the person as against the land. By the statute 3 & 4 Will. 4, c. 42, s. 3, the right to interest for twenty years under the bond and covenant is *in terms* preserved:

and the judgment of the Court of Common Pleas in [*337] *Paget v. Foley*, (a judgment which I am fortunate "in having for a guide), decides that the two statutes are to be reconciled by treating the third section of the statute, c. 42, as an *exception* (I will presently consider the force of that expression) out of the operation of c. 27, s. 42. To this extent, subject only to a proper explanation of the sense in which the 3rd section of c. 42 is to be considered as an exception from the 42nd section of chapter 27, I think no difference will be found to exist between my opinion and that of the counsel on both sides at the bar.

Now, with respect to the sense in which the latter act, c. 42, s. 3, is an exception out of the earlier statute, c. 27, s. 42, it was ar-

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gued for the mortgagors that the words of the 42nd section of c. 27, and the policy of that act, wholly cleared and discharged the land of all liability, except for the principal monies and six years' interest, and that c. 42, s. 3, had the effect only of preserving the remedy of the mortgagee upon the bond and covenant against the person of his debtor only. The argument in effect was, that I must treat the action given or saved by the 3rd section of c. 42 as an exception out of chapter 27, s. 42, in this limited sense only,—that the latter section must be read as prohibiting actions or suits for more than six years' interest, in respect of money charged upon land, except where the money was also secured by bond or covenant, in which case the person of the debtor should remain liable upon the bond or covenant, but the land be discharged from more than six years' interest. The counsel for the mortgagees, on the other hand, contended that, under the two acts referred to, the case of a mortgage debt secured by bond or covenant was an exception out of sect. 42 of the statute 3 & 4 Will. 4, c. 27, to all intents and purposes,—that I must read the two acts thus: "That no action or suit shall be brought to recover more than six years' interest in respect of money "charged on land," except where the ["338] debt is secured by bond or covenant as well as by mortgage, in which case the amount recoverable under the bond or covenant shall be recoverable against the land also.

If I might assume that neither of these constructions is inconsistent with the words of the statute, c. 27, s. 42, and that I am at liberty to adopt either construction, there could not be a balance in the scale of probabilities as to which of the two constructions was intended by the legislature. The policy of a law, which, in the absence of acknowledgment of a debt, discharges both the person and property of the debtor, and limits the demand of the creditor after a certain period of nonclaim, is intelligible and sound; but the language of an act of Parliament must be very clear which could persuade me that the legislature, expressly intending to keep the debt alive and to preserve the remedies against the person of the debtor, intended that the securities for the debt in the hands of the mortgagor himself (for to that length the argument must go) should be

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discharged from the contract between the parties, and be made liable to the debts circuitously only through the judgment upon the bond or covenant; and I confess I am not persuaded that there is anything in the statute, c. 27, s. 42, necessarily to exclude the construction of the act in this respect, for which the Plaintiff contends.

Again, let it be supposed that the words of the two statutes strongly favour the Defendant's construction,—in that case the contract between the parties will be varied. The mortgages will have a security upon the land for part of his debt, and a claim against his debtor by specialty for the rest. Now I certainly find nothing in

either act to preclude a Court of equity from applying to [339] such a case the ordinary rules by which justice is administered in that Court. Suppose then a bill by a mortgagee against a mortgagor in his lifetime to enforce payment of his whole debt by foreclosure or otherwise: that such a bill would lie I cannot doubt; and the ordinary rule of equity is, that where a Plaintiff is properly drawn into equity to enforce part of his demand, he may assert his full rights in that Court, although his demand in part be purely legal; and the mortgagor contending, as he does, and must contend, that the suit (though to foreclose) is a suit to recover money, cannot deny the right of the mortgagee under some form of decree to obtain satisfaction of his whole demand. I admit that a mortgagee cannot in general tack a bond debt to his mortgage in a suit against the mortgagor himself, although the rule of the Court seems to have been formerly otherwise (*a*). But the case of tacking supposes the bond and the mortgage debt to be several and not the same debt, whereas in the case I have suggested, the mortgagee is suing for one and the same debt, in respect of different parts of which he holds different securities. Now if the mortgagor in such a suit should submit to a foreclosure in respect of so much of the debt as the mortgage was admitted to cover, it would be obviously more for his benefit that the balance of interest should be covered by the foreclosure also; and if he should elect to redeem the estate, the mortgagee might, by means of a sequestration, recover the balance of his interest out of the very estate which the mortgagor had

(a) Coote on Mortgages, p. 479, 2nd ed.

 1843.—*Du Vigier v. Lee.*

so redeemed. These considerations, if well founded, cannot but favour the conclusion that the construction of the 42nd section of c. 27 of the statute, for which the Plaintiff has contended, is the true construction of the act.

In the suit before me, the proceeding is against the parties claiming the real estate as volunteers under the mortgagor. The observations which I have made upon the supposition that the mortgagor is living, and was a Defendant in the suit, would of course apply to those who claim as volunteers under him. But without resorting to that extreme case, I do not find anything to prevent me from applying to the case before me what I consider to be the ordinary rules of equity. The utmost extent to which the argument of the mortgagor can go is, that part only of the debt is secured by the mortgage, the rest by specialty only; that is, he treats the two debts as several. I do not find anything in the case that would deprive this mortgagee of the usual rights of a mortgagee to tack a bond debt to his mortgage in a proceeding against a volunteer claiming under the mortgagor. It is clear that he might by circuitry have reached the same estate, and it is not suggested that there are other creditors or persons having a lien upon the estate whose interests might impede the mortgagee, although those of the mortgagor do not.

I think it right to notice another argument used on the part of the mortgagor. It was said that if I rejected the mortgagor's construction of the statutes, there was nothing upon which the c. 27, s. 42, could operate, so far as charges on the land by way of mortgage were concerned. This is not quite an accurate representation of the case: many cases certainly would remain in which the act would operate; for example, on mortgages without bond or covenant, instances of which occurred in the cases cited during the argument. Equitable mortgages of every description would remain within its operation. The law which before the statute, c. 27, enabled a creditor to enforce a lien where his debt as against the person is barred by the Statute of Limitations would be materially altered, [*341] and cases might possibly be put in which bankruptcy or insolvency might have discharged the person of the debtor, and left only the land for the creditor to resort to, and which might pos.

CASES IN CHANCERY.

1843.—*Jones v. Howells.*

sibly be affected by the statute I am now considering. This case, therefore, is not one of those in which the Court, in order to give some effect to the statute, and in order to carry out its view is compelled to do that which in other respects it would consider to be contrary to the intention of the legislature. Upon the whole, I think the mortgagee is entitled to recover the principal and interest which he claims.

The decree will be in the ordinary form in a suit for foreclosure, and this direction will also dispose of the third question,—that of the costs of the suit.

['842]

**JONES v. HOWELLS.*

JONES v. GODSALL.

1843 : 23d and 27th March.

The Defendants to an original bill held to be necessary parties to a supplemental bill against a new Defendant where the interests of such original Defendants as well as those of the new Defendant required that the new Defendant should be a party to the suit.

Bill, by one of two next of kin, to recover from the executors of a testator funds as to which it was alleged that he died intestate, and which, in that case, they had erroneously applied. The Defendants, by their answer, said, that there was another person, a next of kin. After the cause was at issue, the Plaintiff filed a supplemental bill against the other next of kin alone :—*Held*, that the Defendants, the executors, ought to have an opportunity of stating upon the pleadings any case they might have as against the other next of kin, and that therefore the executors ought to be parties to the supplemental bill.

Seemle, a party suing as executor or administrator cannot sustain proceedings to recover a larger sum than that upon which the probate-duty is calculated.

Seemle, the question whether a prerogative or a diocesan probate is necessary, depends, not upon the place in which the estate of the testator comes to be administered, but on the local situation of the property at the time of his death.

W. MORGAN, by his will and codicil, both dated the 10th of July, 1817, bequeathed the residue of his personal estate to his wife Sarah, and John Howells, his executrix and executor, upon trust (subject to the payment of his debts and certain legacies within six months

1843.—Jones v. Howells.

after his decease) to pay to or permit the said *Sarah* to receive the annual proceeds thereof for her life, and after her decease to pay the remainder as she should by her will give or bequeath the same. The will and codicil were proved by *Sarah Morgan* and *John Howells* on the 21st of August, 1818, in the Diocesan Court of *Hereford*.

Sarah Morgan, by her will and several codicils, the last of which was dated the 3rd of April, 1820, disposed of her personal estate, and thereby bequeathed legacies to the amount of 4,500*l.* and upwards, and appointed *James Howells*, the said *John Howells*, and another, her executors. *Sarah Morgan* died in May, 1820. *James Howells* and *John Howells* proved the will of *Sarah Morgan*, and administered the most part of the estate which came to their hands as executors, but which chiefly consisted of that which formed the residuary estate of *W. Morgan*.

*The bill was filed on the 3rd of September, 1839, by [*343] *Sarah Jones* and her husband, as representative of *Sarah Kinnersley*, charging that the power of appointment of the residuary estate of *W. Morgan*, given by his will to *Sarah Morgan* his wife, was not exercised by her will, and claiming the distribution of the same as upon intestacy. The Defendants were *James Howells*, the surviving executor of *Sarah Morgan*, *Catherine Howells*, who was the personal representative of *John Howells*, and *George Jones*, as the personal representative of *W. Morgan*.

The bill alleged that *Sarah Kinnersley*, who died in September, 1822, was the sole next of kin of *W. Morgan* at the time of his death, and that *W. Kinnersley* "duly proved the will of *Sarah Kinnersley* in the Registry of the Diocese of *Hereford*, being the proper Ecclesiastical Court." That *W. Kinnersley* died the 16th of April, 1839, intestate, and letters of administration de bonis non of the estate of *Sarah Kinnersley* had been granted to the Plaintiff *Sarah Jones* out of the Consistory Court of the Bishop of *Hereford*.

The bill also alleged that *John Howells* and *James Howells* proved the will and possessed the personal estate of *Sarah Morgan*, and also the personal estate of *W. Morgan* which was in her hands, to a large amount: that *John Howells* died intestate, and that letters

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of administration of his estate were duly granted to the Defendant *Catherine Howells*; and that letters of administration de bonis non of the estate of *W. Morgan*, with his will annexed were granted out of the Prerogative Court of the Archbishop of *Canterbury* to the Defendant *George Jones*.

The bill prayed that an account might be taken of the [*344] personal estate of the testator *W. Morgan*, and the residue thereof ascertained, and that the Defendant *James Howells* might be declared personally liable to make good the whole of Plaintiff's moiety of the said residue with interest thereon from the time of the death of *Sarah Morgan*, and the costs of suit; and that the Defendant *Catherine Howells* might also be declared personally liable to make good the Plaintiff's said moiety, interest and costs, to the extent of the said *W. Morgan's* estate misapplied by her and the Defendant *James Howells* since the death of *John Howells*, and that out of the assets of *John Howells* she might be declared liable to make good the Plaintiff's moiety, interest and costs to the extent of *W. Morgan's* estate so misapplied by *John Howells* and *James Howells*; and that, if necessary, the usual accounts of the estates of *Sarah Morgan* and *John Howells*, deceased, might be taken.

The Defendants *James Howells* and *Catherine Howells* by their answers said that *Sarah Morgan* had always treated the residuary estate of *W. Morgan* as her own absolute property; that it was her intention by her will to dispose of it, and that it was so situated that effect could not be given to her will, unless it was included. They said that her executors had acted on the belief that the property formerly belonging to *W. Morgan* had passed by the will of *Sarah*, and had paid and distributed the same accordingly. They said that one *Jane Morgan* was of kin to *W. Morgan* in equal degree with *Sarah Kinnersley*, under whom the Plaintiff *Jones* claimed.

In June, 1840, a preliminary reference was directed to inquire who were the next of kin of *W. Morgan* living at his death, and if any had since died who were their personal representatives. [*345] The Master, in January, 1843, reported that *Sarah Kinnersley* and *Jane Morgan* were such only next

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of kin, and that both of them were dead ; and he found that the Plaintiff *Sarah Jones* was the personal representative of *Sarah Kinnersley*, and that *W. Godsall* was the personal representative of *Jane Morgan*. The subpoena to rejoin was served in November, 1842, and the cause was at issue before the report was made.

After the report was made, the Plaintiffs filed their supplemental bill against *W. Godsall* alone, for the purpose of making him a party to the suit, as the personal representative of *Jane Morgan*.

At the hearing, Mr. *Roupell*, for the Plaintiff.

Mr. *Tinney* and Mr. *Hallett*, for the Defendant, the representative of *Sarah Morgan*, to three preliminary objections: first, that the estate of *Sarah Kinnersley* was not sufficiently represented by virtue of the letters of administration granted to the Plaintiff out of the Diocesan Court, and that the letters of the Prerogative Court were necessary: *Jernegan v. Baxter* (a); *Twyford v. Trail* (b); *Beadles v. Burch* (c). The diocesan administration may be altogether void (d). Secondly, that it appeared by the letters of administration (e) granted to the Defendant *George Jones* of the estate and effects of *W. Morgan* left unad- [*346] ministered, that they were limited to the purposes of the suit, and bore a stamp applicable to an estate sworn under the value of 50*l.*, whereas the object (if any) for which the representative was necessary was the distribution of an estate on an alleged intestacy, of the value of 16,000*l.* or upwards, which could not be

(a) 5 Sim. 568.

(b) 7 Sim. 92.

(c) 10 Sim. 332.

(d) 1 Williams on Executors, 237, 3rd ed.

(e) This appeared on the production of the letters of administration in court, which recited the intended suit, and limited the administration to the purposes thereof, and to attend, supply, substantiate, and confirm the proceedings already had, or that should or might thereafter be had in the said cause, or in any other cause or suit which might be commenced in the said court, or in any other court, between the said parties, touching or concerning the matters at issue in the said cause or suit, and until a final decree should be had or made therein, and the said decree carried into operation, and the execution thereof fully completed, but no further or otherwise. See 8 Sim. 509; and see also *Brant v. King*, 1 Williams on Executors, 489.

 1843.—*Jones v. Howells*.

effected without general letters of administration, bearing a stamp applicable to that sum: *Clough v. Dixon* (a); *Moores v. Choat* (b); *Killock v. Greg* (c). And thirdly, the suit was defective, owing to *W. Godsall*, the representative of *Jane Morgan*, not being a party to the same suit with the Defendants *James Howells* and *Catherine Howells*. The defect was not cured by making *Godsall* the sole Defendant to a supplemental bill: *Dyson v. Morris* (d).

Mr. *Kenyon Parker*, Mr. *Hall*, and Mr. *Jolliffe*, for the other Defendants to the original bill.

Mr. *Anderdon*, for *Godsall*, the Defendant in the supplemental bill, offered to submit to any inquiry which the Court might direct, as between him and his co-Defendants, in the same manner as if those Defendants had by their answer made a case for inquiry.

Mr. *Roupell*, and Mr. *G. L. Russell*, for the Plaintiffs.

The diocesan administration is sufficient for the present: [*347] *purpose,—that of having the accounts taken. It may not be sufficient where money is to be paid out of Court, or perhaps when the Court is called upon to make a final decree for the distribution of the fund; but it certainly shews a sufficient title for a preliminary decree to ascertain whether anything is due: *Metcalfe v. Metcalfe* (e). The case of *Youhy v. Elworthy* (g) does not express the ultimate opinion of Sir *John Leach* on the point. He afterwards decided differently (h): 1 *Williams on Executors*, p. 229, 8d ed. The limited administrator also represents *W. Morgan's* estate, for all the purposes of this suit. The object certainly is to recover for that estate a much larger sum than £50, but it is possible that the amount of the present claim may never be recovered. If the

(a) 10 Sim. 564.

(b) 8 Sim. 508.

(c) Before Lord Brougham, 2nd Aug. 1831. Not reported. See *Hunt v. Stevens* 3 Taunt. 113; *Rogers v. James*, 7 Taunt. 147; and see *Thyane v. Prothero*, 2 M. & S. 553.

(d) 1 Hare, 413.

(e) 1 Keen, 74.

(g) 1 Myl. & K. 216.

(h) 1 Dan. Chan. Pr. p. 418, n. (e). See *Pearce v. Pearce*, 1 Keen, 76, n. (i).

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Plaintiffs should succeed in getting in the estate of *W. Morgan*, it is plain that estate cannot be distributed without a general administration, and the payment of the proper stamp duties ; but it is not open to a debtor who denies that he is under any liabilities to the estate, to protect himself by insisting that these liabilities shall not be inquired into, unless the same administration is taken out, and the same stamp duties paid, as if the claim against him were not only fully established but the debt realized. The supplemental bill against *Godsall* alone makes him a proper party to the suit as against all the others ; for there is no new equity arising out of the circumstance of a share of the residue being due to him instead of the Plaintiffs. The question is the same. The representatives of *Sarah*, moreover, were aware of the title of *Jane Morgan*, and stated it upon their answer, when they had an opportunity of raising any case applicable to their defence as to that share of the residue. And for their complete protection in this [*548] respect, if any more were needed, all the other parties are willing now to give them, for the purpose of inquiry, the benefit of any case which they could have suggested upon their answer : *Greenwood v. Atkinson* (a).

 VICE-CHANCELLOR :—

The principal question in this suit,—whether *W. Morgan* died intestate,—depends upon the question, whether the will or codicil of *Sarah Morgan* was a valid execution of a power given her by *W. Morgan* to dispose of all his property, of which he made her tenant for life. The intestacy (if it existed) arose on the death of *Sarah Morgan*, in May, 1820. It appears, by the Master's report, that not only *Sarah Kinnersley*, who is represented by the Plaintiffs, but also one *Jane Morgan*, deceased, were next of kin of the testator, *W. Morgan* ; and, therefore, that the Plaintiffs had inaccurately claimed as representing sole next of kin of *W. Morgan*, and that the representatives of *Jane Morgan* ought regularly to have been par-

(a) 5 Sim. 419.

1843.—*Jones v. Howells.*

ties to the original suit. The supplemental bill against *Godsall* was not filed until 1848, after the original cause was at issue ; and there was, therefore, no representative of *Jane Morgan* a party to any proceedings for the recovery of the estate of the alleged intestate until upwards of twenty years after the title, if any, of *Jane Morgan*, or her representatives, accrued.

The Defendants, who represent *Sarah Morgan*, say, (but of this I have no evidence), that, in the belief that her will was [*349] a valid execution of the power given her by the will of

W. Morgan, his estate has been distributed. By their answer, they suggest some case against the claim of the Plaintiff ; but *Jane Morgan* not having, in person, or by her representative, been a party, and her claim being in fact excluded by the prayer of the bill, no opportunity of making a case against her has been afforded to the representatives of *Sarah Morgan*,—not even that case which possibly may arise under the Statute of Limitations.

In this state of the record, several preliminary objections have been taken : first, that the representatives of *Sarah* are not parties to the supplemental bill ; secondly, that the Plaintiffs claim only by virtue of a diocesan, and not a prerogative grant of administration ; and, thirdly, that the letters of administration, under which the estate of *W. Morgan* is represented by the Defendant *Jones*, are too limited in their scope, and insufficiently stamped.

It is plain that one effect of a simple decree for an account against the Defendants in this suit, would be, in some sense, and for some purposes, to convert *Godsall* into a Plaintiff, as against the representatives of *Sarah Morgan*, and to enable her to recover against such representatives her distributive share of the estate in question ; and unless an opportunity has been, or is now, afforded to *Sarah Morgan's* representatives of making a case by way of defence to any claim against them by the representatives of *Jane Morgan*, they would, on further directions, be without a defence against that claim, and would have no opportunity of making one, however just a defence they might have. The preliminary inquiries gave them no such opportunity ; for the question there was simply, whether

 1843.—*Jones v. Howells*.

the parties indicated, or other persons, were next of kin or *not. It is equally clear, that, if *Jane Morgan* or [*350] *Godsall*, her representative, had been originally parties in the same cause with the representatives of *Sarah Morgan*—the latter might have raised any case which the circumstances permitted for the purpose of shewing that, so far as the interest of one of the next of kin was concerned, they had a good defence. This course of defence, the mode of proceeding adopted has hitherto precluded the Defendants from taking; but justice evidently requires, and it is not disputed, that, in some form they should have an opportunity of bringing before the Court any case which they may have as against those who claim under *Jane Morgan*. To obviate this objection to the present frame of the suit, all parties, except the representatives of *Sarah*, offer, at the hearing, to submit to any inquiries which the Court, in its discretion, or at the application of the representatives of *Sarah*, may think fit to direct with reference to this part of the case. The latter Defendants, however, say, that they have come to the hearing of the cause unprepared to suggest what may be necessary for this part of their defence, and, in fact, without notice of the existence of the supplemental bill, or of any proceeding in which the rights of the representative of *Jane Morgan* could be bound or discussed. And I cannot deny that this may be the case; nor can it be reasonably denied that these Defendants are entitled to the opportunity, which they claim, of deliberately stating, upon the pleadings, all those matters which may constitute their defence against the claims of each of the next of kin. In *Dyson v. Morris* (a), I stated my impression of the general rule on the subject of making parties to the original bill parties to a supplemental bill to be, that the original defendants were necessary parties where their interests required that the *new de- [*351] defendants should be brought before the Court for the purpose of deciding questions between the original and new defendants; and that the original defendants were not necessary parties to the supplemental bill, where the new defendants were brought before

(a) 1 Hare, 420.

1848.—Jones v. Howells.

the Court to contest some question with the plaintiff, in which the original defendants had no interest. To this rule there may be exceptions, and cases not calling for its application. In this case, the admission of the Plaintiffs, that proper inquiries must be directed for the protection of the representatives of *Sarah*, if they require it, or (without such admission), my clear and decided opinion, that the representatives of *Sarah* must have an opportunity of bringing forward their defence, goes a great way to—and, in the absence of authority, would—decide the course which I ought to take on the present objection. The case of *Feary v. Stephenson* (a) is also in favour of the claim which the representatives of *Sarah* now make, that *Godsall* may be brought before the Court in a suit to which they are parties.

In *Dyson v. Morris*, I availed myself of the direct authority of *Greenwood v. Atkinson* (b), and the tacit authority of the other cases, to make that decree, which appeared substantially just, and by which expense would be saved. The executors of *Edgar Taylor*, in that case, enabled me, by decree, at once, and without further litigation or inquiry, to give the mortgagor (the objecting party) all he asked against those executors, namely, a conveyance. The mortgagor obtained by the decree, in *Dyson v. Morris*, at once, and without litigation, all he asked: there was nothing more to try;

and I availed myself of the authority of the cases referred to for the "purpose of saving expense, when I could at once give the objecting party all he could claim as the ground of his objection. The case may be very different where I cannot at once give the objecting party all he asks: where the rights of the co-defendants are to be litigated inter se, and I cannot immediately decide and secure those rights.

Where there is or may be (and here, I am told, there is, and I see that there may be) a case between co-Defendants, which each, as against the other, claims a right to litigate,—whether to be determined upon a cross-bill, or by inquiries between co-Defendants, is not the question,—the rule of the Court, as I understand it, is, that every defendant shall have an opportunity of stating upon the

(a) 1 Beav. 42.

(b) 5 Sim. 419.

1843.—Jones v. Howels.

record the case he relies upon against every party to the cause with whom he may have rights to litigate. I think *Greenwood v. Atkinson* was not meant to decide anything opposed to this principle; and the cases put by the *Vice-Chancellor* shew his opinion to be, that, where there is a question to try, the parties must, quoad the form of the record, be in the same position as if the original bill had been properly framed in the first instance. *Feary v. Stephenson* supports the same proposition. In the application of undisputed principles to individual cases, differences of opinion must inevitably occur; and if there be any difference between the opinion I now express, and that to be collected from *Greenwood v. Atkinson*, I am satisfied that such difference is not in the principle, but in the mode of applying it. In this case *Jane Morgan*, or her representative, ought regularly to have been a party to the original record. There are questions to settle between her and the Defendants, who represent *Sarah's* estate,—these questions must be settled in the course of this litigation; and those Defendants have had no opportunity of stating their case upon record [*353] in the course of the proceedings, as a foundation either for a cross bill or an inquiry; and they are placed in that position by an informality in the original bill, for which the Plaintiff is responsible. I think those questions are not formal merely, but are important in substance,—and that justice requires that I should allow this objection.

It is not necessary that I should now express an opinion upon the other points which have been discussed; but I may observe, as the means, perhaps, of saving expense and delay, that the second question, whether the diocesan letters of administration which the Plaintiff has obtained of the estate of *Sarah Kinnersley* are sufficient, must, in my opinion, depend upon the fact of whether there were bona notabilia of *Sarah Kinnersley* out of the diocese. The circumstance that property in which she was interested now comes to be administered in this Court does not affect the question: *Metcalf v. Metcalf* (a); *Beadles v. Burch* (b). The decision of Sir John Leach in *Young v. Elworthy* (c) does not impugn this

(a) 1 Keen, 74.

(b) 10 Sim. 332.

(c) 1 Myl. & K. 215.

 1843.—*Coleman v. Rackham.*

distinction. It will, however, be important that the Plaintiff should consider their position in this respect, for the facts with regard to the bona notabilia must be ascertained, and there is authority for holding a diocesan administration void, in cases in which a prerogative administration is necessary: it may be too late to supply the want of the latter at the hearing of the cause: *Simons v. Milman (a)*.

With respect to the remaining point—the sufficiency of [*354] the limited administration granted to *Jones*—I should not now advert to it, if it had not been stated in argument that the practice of the *Vice-Chancellor of England* was to allow a cause to proceed where it appeared that the stamp was paid in respect of a smaller sum than that which was in question in the cause, but to compel the parties to procure the larger stamp before payment of the fund which might be recovered. I find upon inquiry that this is not the practice in that branch of the Court; and that the rule laid down by Lord *Brougham* in *Killock v. Greg*, requiring the party to shew that he represents the estate to a sufficient amount to cover his claim, is the rule of that branch of the Court. Let the same order be made in this case as in *Feary v. Stephenson*.

 COLEMAN v. RACKHAM.

1843 : 6th May.

Verification of the copy of the bill, served under the 24th Order of August, 1841.

MEMORANDUM of service of a copy of the bill (*b*), examined with the office copy. Ordered to be entered, under Order XXIV, of August, 1841.

Mr. *Heathfield*, for the motion.

(a) 2 Sim 241.

(b) The Verification may be as above; or by comparison with the ingrossment: (*Blew v. Martin*, 1 Hare, 160); or with the draft of the bill. (*Penfold v. Bouch*, ante, p. 157.)

 1843.—Hillersdon v. Lowe.

*HILLERSDON v. LOWE.

[*355]

1843 : 13th, 17th, and 25th January.

The testator gave his real and personal estate in trust for his nephew John for life and, after his death, to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there was no such son of John, to two other nephews of the testator, and their sons successively; and in case none of them, the said three nephews, should have a son who should *survive the survivor* of them, and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters:—*Held*, that the testator in the words of devise to the fourth nephew must be construed to mean that such limitation should take effect in case none of the first three nephews should leave a son *surviving his parent* and attaining twenty-one,—a different construction being repugnant to specific directions as well as to the general scheme of the will,—creating cases of intestacy,—and supposing a capricious and irrational intention;—and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate.

THE testator, *John Hillersdon*, by his will, dated in 1806, after giving to *J. Lowe* and another all his real and personal estate and effects (not otherwise thereby disposed of), declared the trusts thereof as follows:—

Upon trust, during the life of my nephew *John Grove*, to pay the rents and annual interest thereof unto *John Grove*; and after his death, in case he shall leave issue one or more son or sons, then to apply the rents and annual interest thereof in the maintenance of such son of *John Grove*, as for the time being shall be the eldest son or only son of *John Grove*, until such eldest son or only son shall attain the age of twenty-one years, and when such eldest son or only son of *John Grove* shall attain the age of twenty-one years, then to convey, assign, transfer, and pay my said real and personal estate unto such eldest son or only son; but in case *John Grove* shall leave no son who shall survive him and live to attain the age of twenty-one years, then, during the life of my second nephew *Joseph Grove*, to pay the rents and annual interest of my said real and personal estate unto *Joseph Grove*; and after the death of *Joseph Grove*, in case *Joseph John Grove*, the son of *Joseph Grove*, shall happen to survive *Joseph Grove*, his father, then to pay the

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rents and annual interest of my real and personal estate [*356] unto *Joseph John Grove*, the son, during his life ; and after the decease of the survivor of them, *Joseph Grove*, the father, and *Joseph John Grove*, the son, in case *Joseph John Grove*, the son, shall leave one or more son or sons who shall survive the survivor of them, *Joseph Grove* and *Joseph John Grove*, the son, then to apply the rents and annual interest thereof in the maintenance of such son of *Joseph John Grove* the son, as for the time being shall be the eldest son of, or only son of *Joseph John Grove*, the son, until such eldest son or only son shall attain the age of twenty-one years, and when such eldest son or only son shall attain the age of twenty-one years, to convey, assign, transfer, and pay my said real and personal estate unto such eldest son or only son of *Joseph John Grove*, the son ; but in case *Joseph John Grove*, the son, shall die in the lifetime of *Joseph Grove*, the father, without leaving issue male, who shall survive *Joseph Grove*, the father, and live to attain the age of twenty-one years, and *Joseph Grove*, the father, shall die, leaving other issue one or more son or sons, then to apply the rents and annual interest of my real and personal estate in the maintenance of such son of *Joseph Grove*, the father, as for the time being shall be the eldest son or only son of *Joseph Grove*, the father, until such eldest son or only son shall attain the age of twenty-one years, and when such eldest son or only son shall attain the age of twenty-one years, then to convey, assign, transfer and pay my real and personal estate unto such eldest son or only son ; but in case none of them *John Grove*, *Joseph Grove* the father, and *Joseph John Grove* the son, shall happen to leave any son or sons who shall survive the survivor of them *John Grove*, *Joseph Grove*, and *Joseph John Grove*, and live to attain the age of twenty-one years, then, during the life of my third nephew *Henry Grove* to pay the rents and an- [*357] nual interest of my real and personal estate unto *Henry Grove* ; and after the death of *Henry Grove*, in case he shall leave issue one or more son or sons, then to apply the rents and annual interest thereof in the maintenance of such son of *Henry Grove*, as for the time being shall be the eldest son or only son

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of *Henry Grove*, until such eldest son or only son of *Henry Grove* shall attain the age of twenty-one years, and when such eldest son or only son of *Henry Grove* shall attain the age of twenty-one years, then to convey, assign, transfer, and pay my real and personal estate unto such eldest son or only son; but in case none of them, *John Grove*, *Joseph Grove*, *Joseph John Grove* and *Henry Grove*, shall happen to leave any son or sons who shall survive the survivor of them, *John Grove*, *Joseph Grove*, *Joseph John Grove*, and *Henry Grove*, and shall live to attain the age of twenty-one years, and *John Grove* shall leave issue one or more daughter or daughters, who shall survive the survivor of them, *John Grove*, *Joseph Grove*, *Joseph John Grove*, and *Henry Grove*, then from and after the death of the survivor of them *John Grove*, *Joseph Grove*, *Joseph John Grove*, and *Henry Grove*, and of their issue male under the age of twenty-one years, to pay all the rents and annual interest of my real and personal estate for the maintenance of such daughter of *John Grove*, as for the time being shall be the eldest daughter or only daughter of *John Grove*, until such eldest daughter or only daughter shall attain the age of twenty-one years; and when such eldest daughter or only daughter shall attain the age of twenty-one years, then to convey, assign, transfer, and pay my real and personal estate unto such eldest daughter or only daughter; but in case there shall be no such issue female of *John Grove*, then, from and after the decease of the survivor of them *John Grove*, *Joseph Grove*, *Joseph John Grove*, and *Henry Grove*, and of their issue male under the age of twenty-one years, to pay all the [*358] rents and annual interest of my real and personal estate for the maintenance of such daughter of *Joseph Grove*, as for the time being shall be the eldest daughter or only daughter of *Joseph Grove*, until such eldest daughter or only daughter shall attain the age of twenty-one years; and when such eldest daughter shall attain the age of twenty-one years, then to convey, assign, transfer, and pay my real and personal estate unto such eldest daughter or only daughter of *Joseph Grove*; but in case there shall be no issue female of *Joseph Grove*, then from and after the decease of the survivor of them *John Grove*, *Joseph Grove*, *Joseph John Grove* and *Hen-*

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ry Grove, and of their issue male under the age of twenty-one years, to pay all the rents and annual interest of my real and personal estate for the maintenance of such daughter of *Joseph John Grove*, as for the time being shall be the eldest daughter or only daughter of *Joseph John Grove*, until such eldest daughter or only daughter shall attain the age of twenty-one years; and when such eldest daughter or only daughter shall attain the age of twenty-one years, then to convey, assign, transfer, and pay my real and personal estate unto such eldest or only daughter of *Joseph John Grove*; but in case there shall be no issue female of *Joseph John Grove*, then from and after the decease of the survivor of them *John Grove*, *Joseph Grove*, *Joseph John Grove*, and *Henry Grove*, and of their issue male under the age of twenty-one years, to pay all the rents and annual interest of my real and personal estate for the maintenance of such daughter of *Henry Grove*, as for the time being shall be the eldest daughter or only daughter of *Henry Grove*, until such eldest or only daughter shall attain the age of twenty one years; and when such eldest or only daughter shall attain the [*359] age of twenty-one years, then *to convey, assign, transfer, and pay my real and personal estate unto such eldest or only daughter of *Henry Grove*.

The testator then proceeded to direct that *John Grove*, *Joseph Grove*, *Joseph John Grove* and *Henry Grove* and their issue male and the husbands of their issue female, entitled to the rents and annual interests or to the conveyance and assignment of the real and personal estate, should within twelve months after so becoming entitled, take the name and arms of *Hillersdon*, or in default thereof that the person or persons who would be entitled in case the person or persons neglecting the same were then dead, should, upon complying with such directions, take, and receive the said rents, interest, or conveyance and assignment in the same manner as if the person or persons neglecting to take and use the same was or were then dead without issue, and he gave and devised and bequeathed the same accordingly.

The testator then proceeded,—“But in case none of them, *John Grove*, *Joseph Grove*, *Joseph John Grove* and *Henry Grove* shall

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happen to leave issue male or female who shall survive the survivor of *John Grove*, *Joseph Grove*, *Joseph John Grove* and *Henry Grove*, and live to attain the age of twenty-one years, or if they *John Grove*, *Joseph Grove*, *Joseph John Grove*, and *Henry Grove* or their issue, when and as they shall respectively become entitled to the rents and annual interest, or to a conveyance, assignment and transfer of my real and personal estate, or within twelve months afterwards, shall omit, neglect, or decline to take and use my name and arms in the manner hereinbefore directed, then upon trust, and I give, devise and bequeath my said real and personal estate and effects unto and amongst all and every of my nieces, the daughter and daughters of my sister *Louisa Grove*, and all and every [*360] the child and children male and female of such my nieces who shall be living at the time of my death, and to his, her, and their heirs, executors and administrators for ever, equally, share and share alike, to take as tenants in common, and not as joint tenants, and I direct my trustees, &c., to convey, assign, transfer and pay the same accordingly."—And he appointed his said trustees, and *John Grove*, his executors.

The testator died in 1807, leaving the said *John*, *Joseph John*, and *Henry*, and also some daughters of *Louisa*, surviving. The residuary estate of the testator consisted of freehold, copyhold, and leasehold estates, and of stock in the public funds. *John Grove* took the name and arms of *Hillersdon*, and received the rents and interest until his death. He died in 1839, leaving the Plaintiff, his only son (who had previously attained his age of twenty-one) surviving. The bill was filed by the Plaintiff after the death of his father, praying that the trustees might be decreed absolutely to convey, surrender, and assign the said estates unto the use of the Plaintiff, his heirs, executors, administrators, and assigns respectively, and to transfer the said stock to him, for his own use and benefit.

At the hearing the question arose whether the two nephews, *Joseph Grove* and *Joseph John Grove*, were necessary parties to the suit, and the case was argued, first, on the point of parties, and then, by direction of the Court, on the construction of the will.

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Mr. *Kenyon Parker* and Mr. *Haldane*, for the Plaintiff, cited *Uthwatt v. Bryant* (a), *Roe d. Allport v. Bacon* (b), *Jenkins v. Herries* (c).

[*361] Mr. *Koe*, Mr. *Roupell*, Mr. *Lovat*, Mr. *Campbell*, Mr. *Bacon*, Mr. *Wood*, Mr. *Renshawe*, Mr. *Grove*, and Mr. *Wilkinson* appeared for the several Defendants (d).

The other cases cited were *Smith v. Pybus* (e), *Doe d. Gwillim v. Gwillim* (g), *Bruce v. Bainbridge* (h), *Lord Stanford v. Hobart* (i), *Papillon v. Voice* (k).

VICE-CHANCELLOR:—

The Plaintiff, in this case, claims an absolute interest in the estates which are the subject of the gift, upon the ground that he has performed the two conditions which are annexed to such gift to him—one being that he should survive his father, *John Grove*, and the other that he should attain the age of twenty-one. The Plaintiff relies upon the simple words which, he contends, direct that, in case he should attain twenty-one and survive his father, the trustees shall convey to him the real estate in fee. On the other hand, the special words used in the will to describe the event on which other parties are to take, are relied upon as excluding the absolute interest of the Plaintiff. The Defendants have argued that although the Plaintiff, surviving his father and attaining twenty-one, has acquired some present interest in the property, yet, in the event of his not surviving the survivor of the three, or in the event of no son of some one of them surviving the survivor of the three, the estate is given over.

The persons interested in this view of the question are [*362] *Henry*,—any son *Henry* may have,—the daughters, if any, of *John Grove*, *Joseph Grove*, and *Joseph John Grove*, and, lastly, the daughters of *Louisa*, to whom the estate is

(a) 6 Taunt. 317.

(c) 4 Madd. 82.

(d) The points sufficiently appear in the judgment.

(g) 5 B. & Adol. 222.

(i) 3 Bro. P. C. 81.

(b) 4 Man. & Sel. 366.

(e) 9 Ves. 566.

(h) 2 Brod. & Bing. 123.

(k) 2 P. Wms. 471.

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given by the ultimate limitations in the will, provided others do not take.

In order to explain the view which I take of this case, I shall first advert to that clause which, as I have said, describes the event on which *Henry* is to take; and without saying what the construction of that clause taken with the whole will is, I think it can admit of no doubt (and, in fact, it was conceded in argument), that if the words which describe the events upon which the gift to *Henry* is to take effect were omitted, the direction to the trustees to convey, transfer, assign, and pay the real and personal estate of the testator to the first son of *John* who should survive his father, and attain twenty-one, is sufficient to give and would give to such son of *John* an absolute interest in the real and personal estate. I think it is equally clear, that, if the words which describe the event upon which the gift to *Henry* is to take effect stood alone, these words would entitle *Henry* to claim an interest in the testator's estate, unless a son of any one of his three nephews, *John*, *Joseph*, and *Joseph John*, should survive the survivor of such three nephews, and attain the age of twenty-one. The Plaintiff, however, says that, taking the latter clause, not alone, but in connection with the whole will, the intention is clearly expressed that the trustees are to convey, assign, and pay the real and personal estate absolutely to a son of *John*, surviving him, and attaining twenty-one, and that such conveyance, assignment, and payment will supersede all the subsequent directions in the will. He says that the gifts to *Joseph* and *Joseph John*, and their sons, are made by way of substitution of the estate given to him, the Plaintiff, only in case *John Grove* should leave no son [*363] who should survive him, and live to attain twenty-one; and that, inasmuch as that event has happened, the gift to *Joseph*, and the other parties, can never take effect, and the estate to himself has therefore become absolute. He contends, in effect, that the scheme of the will is to retain the estate in the hands of the trustees until such son of *John* should take, or, failing such son, until some other person, described in the will, should be entitled to call for a conveyance or assignment, and that the first person who should so become entitled was intended to take the estate absolutely.

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I am clearly of opinion with the Plaintiff, upon the gifts in the will preceding that to *Henry*, unless the cause describing the events upon which *Henry* is to take is sufficient to control the antecedent words of the will. The Plaintiff's construction is according to the natural import and effect of the words of the will, and is fortified by the consideration that the direction to the trustees to convey and assign to different persons mentioned in the will, necessarily supposes that no conveyance or assignment can have been previously executed. The difficulty of the Plaintiff is in reconciling his construction with the clause which, according to the Defendants' argument, gives the estate over to *Henry* in the event specified.

Upon the question what effect (if any) that clause should have upon the gift to the Plaintiff, different views have been presented to me by different parties opposing the Plaintiff's claim to an absolute interest. All agree in contending that the Plaintiff's construction of the will is erroneous; but they differ widely in their views of what its effect should be. On behalf of the sisters of the [*364] Plaintiff, it has been contended that the clause in question reduces the Plaintiff's interest to an estate for life, giving estates in remainder for life, by implication to *Joseph* and *Joseph John*, in the event of the Plaintiff's dying in the lifetime of *Joseph* and *Joseph John*, and of the survivor of them, and requiring the Court to respite the conveyance, assignment, and payment, which the will directs, during the lives of *Joseph* and *Joseph John*, and the survivor.

On the other hand, *Henry*, and the children of *Louisa* and other parties opposing the Plaintiff, have admitted that the Plaintiff is entitled to call for a conveyance and transfer of the entire interest, but contend that the instrument of conveyance should contain a proviso for determining the Plaintiff's interest in the event of the son of any of the three nephews surviving the survivor of them, and attaining twenty-one; and that the Court must secure the personal estate until the event shall be determined. On this point, with respect to which the Defendants thus differ, I have no hesitation in saying I think the argument, which requires me to give the

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Plaintiff a life estate only, and to imply life estates to *Joseph* and *Joseph John*, and to respite the conveyance, assignment and payment, cannot be supported. The direction to convey and transfer, taken alone, is (as I have already intimated) a direction to pass the absolute interest. Construing that direction according to the legal as well as natural import of the words, it must carry the entire interest. What is there to limit the Plaintiff's estate to an estate for life? His death will not give the estate over. It is given over, not on his death, but only in case none of the nephews named should have a son surviving such three nephews. His estate, the Defendants admit, may continue after his own death, and ultimately become absolute, by reason of one of the sons surviving the survivor of the nephews. And if I should *give a life [*365] interest only to the Plaintiff, and he should die, leaving *Joseph* or *Joseph John*, upon what principle can I give life estates in remainder to them by implication? The testator has given them express estates, not by way of remainder, but in case *John Grove* shall leave no son who shall survive him and attain twenty-one years of age. Nor, if I were to give the Plaintiff a life estate only, is there any thing in the will to carry the estate to any other person during the lives of *Joseph* and *Joseph John* and the survivor, if either of them should outlive the Plaintiff. Again, if I respite the conveyance, assignment, and payment during the lives of *Joseph* and *Joseph John*, what interest can the Plaintiff claim in the interval? There is no gift to him except in the direction to convey, assign, transfer, and pay. The effect of the argument I am now considering would, therefore, be to create intestacies, against which the will itself provides. And why should I do this? If the testator, according to the true construction of his will, has given his estate to *Henry*, and a son of *Henry*, in the event of the Plaintiff, or some other son of one of the three nephews not surviving them, —why should the Court depart from the mode of giving effect to this intention, in the manner pointed out by the will, namely, by executory devise, and which, if the intention be made out, is effectual for the purpose, and avoid the inconvenience which the contrary argument would introduce. Admitting that, according to the

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construction I have suggested, there may be some contingencies in some events not fully provided for, there is nothing in that aspect of the case to justify the Court in giving a preference to the Defendants' argument.

The observations I have made have been applied only to the clause descriptive of the event upon which *Henry*, and a son of [*366] *Henry*, are to take ; but they apply to each successive clause in the will, in which the estate is given over in terms similar (*Mutatis Mutandis*). I conclude, therefore, that the Plaintiff is entitled to a conveyance of the whole interest, and that he is entitled now to call for such conveyance ; and the only question is, whether it is to be absolute or subject to an executory limitation over, in the event of there being no son of any of the three nephews surviving them,—the Court, in the latter case, securing the personal estate until the event shall be determined.

Now, I do not mean to deny the right of a testator to be capricious in the disposition of his property, but where a plain, simple, and rational scheme for the disposition of property, is made by a testator in one part of his will, and a clause (certainly not of inflexible construction) afterwards occurs, which, according to one construction of it, subverts that scheme, and disappoints the primary objects of the testator's bounty ; and that, without any cause assigned by the testator, or discoverable by the ingenuity of counsel, it is clearly the duty of the Court to examine it with care, and to see whether, by any reasonable construction, of which its words are fairly susceptible, it may not be reconcilable with that scheme of the will, about which, when separately considered, no question can arise. In this case the intention ascribed to the testator by the Defendants' argument is most capricious and irrational. I will take a single example. The objects of the testator's bounty are,—1st. *John* ; 2nd. Sons of *John* ; 3rd. *Joseph* ; 4th. *Joseph John* ; 5th. Sons of *Joseph John* ; 6th. *Henry* ; and 7th. *Henry* and his male issue. Now, any thing which, upon the failure of an estate given to one of those, should give the estate over to the other next in succession is intelligible ; but a clause, which arbitrarily determines the estate of any of them, without reference to the inte-

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rest *of the others, must excite a doubt as to the accu- [*367]
 racy of the expression, unless that expression be very
 clear and precise. The Plaintiff, next to *John*, was the first object
 of the testator's bounty. By the events of surviving his father and
 attaining twenty-one, he becomes entitled to the estate : but of ne-
 cessity he excludes all the other nephews. The Plaintiff, I will sup-
 pose, has a family ; he calls for and obtains a conveyance of the
 estate, which the trustees are directed to make,—he dies, leaving a
 family and *Joseph* and *Joseph John* surviving him. Now, what is
 the effect of the conveyance ? Does his death determine his estate ?
 Certainly not. Nothing can be more clear than that, if an estate
 be given to a person, with a limitation over on a certain event, the
 first estate is absolute, unless that event happens. Notwithstanding
 the Plaintiff dies, the estate remains in his family, and will go either
 to his heir-at-law, or to his devisee, or in any way in which he may
 dispose of it, subject only to the question, whether it will not go
 over according to the devise in the events described by that which
 is stated, as being an executory limitation. The death of the Plain-
 tiff in the lifetime of *Joseph*, or *Joseph John*, does not therefore, in
 this view, determine the Plaintiff's estate ; but a certain event may
 happen which would determine it, and that not in favour of any of
 the objects who come next in the distribution of the testator's bounty.
 The estate would continue as part of the Plaintiff's estate, until it
 was seen whether a son of *John*, other than the Plaintiff, or a son of
Joseph, or a son of *Joseph John*, should survive the survivor of the
 three nephews, and attain the age of twenty-one ; in that case the
 estate will not go over to *Henry*, but remain absolute in the Plaintiff.
 The proposition is not that the Plaintiff must himself survive *Jo-*
seph and *Joseph John*, in order that the estate may become ab-
 solute, but that some one of the excluded parties may
 *do so, and that will give him the estate absolutely. The [*368]
 question whether the Plaintiff's estate is to become abso-
 lute is not made to depend on whether he himself shall survive them,
 but whether one of those persons who cannot, by any possibility,
 touch the estate at all, shall survive them. I think it is quite im-
 possible that could have been the intention of the testator. He

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could not have intended that the interest of the Plaintiff in the estate should be contingent on persons surviving the survivor of the three nephews, where the persons so surviving were not only to take nothing in the estate on the happening of that event, but whose chance of succession to the estate was for ever excluded by the events which had happened.

The only question is, whether the testator has left light enough in this case to guide the court in endeavouring to preserve his real intention. In order to get at his meaning, I have gone back to the clause in which the form of expression, on which the question arises, occurs for the first time. It is in the devise to the eldest son of *Joseph John* (a),—"after the decease of the survivor of them, *Joseph Grove*, the father, and *Joseph John Grove*, the son, in case *Joseph John Grove* the son, shall leave one or more son or sons, who shall survive the survivor of them, *Joseph Grove*, the father, and *Joseph John Grove*, the son." The expression is there very accurate, *Joseph* and *Joseph John* take only life estates: and the testator did not by the form of expression interfere with any estate previously given. He then proceeds in like manner, substituting one estate for another to the sons of *Joseph* and the sons of *Joseph John*, contingently upon their surviving individuals named, and attaining the age [*369] of twenty-one, provided those individuals do not themselves become entitled to the estates, but not otherwise; and in no case does the estate given contingently to any of these parties interfere with any estate previously given, until he arrives at the clause describing the event in which the estate is given to *Henry*. And I may observe that throughout the will the same care is taken not to interfere with one estate by the substitution of another for it, except where the testator uses the expression, "survive the survivor," which occurs in the clause I am now considering. Adverting to this, and to the use first made of that form of expression, I cannot but think that the testator, in the clause describing the events in which *Henry* was to take, has intended only to describe the failure of the previous contingent gifts in the will.

The testator had so disposed of his property that there could be

(a) *Supra*, p. 356.

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no intestacy, unless none of the three sons should leave a son who should survive him, and attain the age of twenty-one. If any one of the three left a son surviving him, and who attained the age of twenty-one, the property was completely disposed of; and the testator had then only to dispose of the property in the event of none of the three having left a son who should survive his father, and attain the age of twenty-one. Now, at the time of making the will, *John*, *Joseph*, and *Joseph John*, were all living, and it was uncertain in what order they would die; but, according to the contingent dispositions, the survivor of them, whoever he might be, might have a son, who, by surviving him, and attaining twenty-one, would become entitled to the estate. The testator then addressing himself by anticipation to this case of intestacy,—to a state of things not existing at the time of the will, that is, assuming some two of his nephews to have died without having left a son who should attain twenty-one, and that the survivor, *whoever he might be, [*370] had also died without leaving a son who should survive him, and attain twenty-one,—makes use of the language on which the question arises,—language which would be accurate if the events had actually happened, which the testator supposes, but is certainly not accurate without that explanation. The testator's meaning is, if all his three nephews should die without leaving a son who should survive his parent, and attain twenty-one, then the estate should go to *Henry*.

I think I am justified in giving this construction to the will, on several grounds:—The opposite construction is capricious and irrational:—and it subverts that scheme of the will, which is expressed in clear and unambiguous language in all other parts of it;—it would also render the direction to the trustees to convey, transfer, and pay, except in a single instance, incapable of execution; whereas it is capable of complete execution upon the principle that the estates are given by way of substitution. There is also the theory which I have founded on the antecedent language,—that the testator himself supposes events to have happened which have not taken place, and has, therefore, contemplated a state of things which does not exist. I

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may mention another ground, which though of little weight alone, yet fortifies this view of the case,—when the testator comes to the limitations to daughters he refers to his former disposition, and describes the events which would leave the estates undisposed of, as occurring “after the decease of the survivor of them, the said *John*, *Joseph John*, and *Henry*, and of their issue male under the age of twenty-one.” After a gift to issue coming within a special description, a reference to such issue male, would, on the general rule of construction, be regarded merely as an “inaccurate reference to what had gone before, and meaning the same thing; but I am satisfied that the testator here meant to describe the estates, which he supposed he had previously given in certain events; and that he intended to point out that the taking effect of the estates he was then giving depended on the failure of issue male of the three nephews attaining twenty-one.

[*371] In giving to this will the construction that I feel bound to give, and, according to which, the Plaintiff takes an absolute interest, the testator’s unequivocal directions,—that the trustees shall convey, assign, transfer, and pay over the real and personal estate,—have their full effect, which, if the opposite construction were admitted, they could not have. I give those estates to the persons,—in the order,—upon the contingencies,—and for the estates and interests mentioned in the will, according to the literal and proper import of the words. I do this with reference to those parts of the will which contain the primary intentions of the testator, in which the directions are simple, and the purpose is clear; and in which, therefore, the chance of his having failed correctly to express his meaning is the least. In giving effect to this part of the will, I avoid the intestacies and incongruities which I have pointed out as the consequences of the construction urged by the Defendants, and I modify the testator’s words in that part of his will in which his directions are the most complex, and the chance of inaccuracy of expression is therefore greatest. Language, which I cannot give effect to in its literal import, without imputing to the testator the most capricious, if not inconsistent, intentions, I modify—so as to avoid those consequences—but without any direct violence to the clause in

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which that language is found. Admitting that, between two inconsistent clauses in a will, the last should prevail, it is a sound rule of construction, that "an intention plainly [*372] declared shall not be avoided by subsequent words of doubtful import, which are not necessarily irreconcilable with the intention first expressed.

The difficulty arises, in this case, from a cause which is fertile in producing litigation. If a testator, having made a disposition of his property on a certain event, would be content with simply saying that, "failing that gift," he gave it over to some "ulterior object of bounty, or if he would repeat in terms what he had said before, he would seldom fail in effecting his intention. The difficulties commonly occur when, after making a disposition of a complicated nature, the testator, intending to make another disposition if the first should fail, but neither simply stating that intention, nor taking the pains to repeat the exact words, endeavours to give an abstract of the former gift. The want of correspondence between the words describing the limitations over, and those which define the previous estates, is a source of numerous suits, although morally the intention is clear,—being, in point of fact, only to give the estate over in the event of the previous limitation not taking effect; and the whole tendency of the modern decisions is so to construe them. In the case of *Ellicombe v. Gompertz* (a), the gift was to particular grandchildren, and failing all grandchildren, then over; but Lord *Cottenham* construed the latter gift as a mere inaccurate mode of referring to the former.

I am of opinion that the Plaintiff is entitled to take the estates absolutely, and the decree must be to that effect.

(a) 3 Myl. & Cr. 127.

 1843.—*Burge v. Brutton*.

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*BURGE v. BRUTTON.

1843 : 20th, 27th, and 28th Feb.

An executor who acts as solicitor in a cause, in which he is a party in his representative character, though he is only allowed personally, as against the estate, such costs as he actually pays,—*held* entitled to be allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive.

The representative of a deceased executor, in accounting for the executor's receipts of the trust estate,—*held* not to be entitled, by way of *discharge*, to the amount of a debt owing to the executor from his testator, without evidence of retainer of the debt by the executor in his lifetime: the amount can only be claimed as a *debt* against the estate.

An executor is not entitled to be allowed the costs of a suit in respect of the estate, prosecuted by a solicitor whom he did not employ: the solicitor himself is the party to apply for costs as a lien on the fund which he has recovered.

ELEANOR CORNETT, by her will, made in 1814, appointed *John Brutton* and another, her executors. *Brutton* was in partnership with Mr. *H. M. Ford*, as solicitor, at *Exeter*, and they were the solicitors of the testatrix. The testatrix died in 1816, and her will was proved by *Brutton* alone, the other executor having renounced. At the time of the death of the testatrix, a suit for redemption (*Chaplin v. Cornett*) was pending against her; and after her death, *Brutton*, as her personal representative, was made a party to the suit by revivor. *Brutton* and *Ford* continued to act as solicitor in the defence of the suit, and in other business of the testatrix's estate, until 1818, when *Brutton* became, from illness, incapable of transacting business. In 1820, the family of *Brutton* entered into an arrangement with *Ford*, by which the latter became the purchaser of *Brutton's* share in the partnership business. *Ford* thenceforward acted as solicitor for the Defendant in the suit. *Brutton* died in 1827, and administration, with his will annexed, was granted to the Defendant *Margaret Brutton*, his daughter. *Margaret Brutton* then entered into possession of the property of the testatrix, including that which was the subject of the redemption suit, and she was made a party to that suit by supplement.

The present bill was filed in 1832, by one of the residuary

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legatees, who was also administrator de bonis non of the testatrix, for an account of her estate received by *Brutton*, and by the Defendant. The accounts were "decreed to be taken. [*374] The Defendant claimed, by way of discharge, the amount of two bills of costs:—1st. The bill of Defendant *Margaret Brutton's* solicitor, against the representatives of the testatrix, from 1808 to 1832, 72*l.* 1*s.* 6*d.* 2nd. The bill of Defendants's solicitor, in the suits *Chaplin v. Cornett*; *Same v. Brutton*; *Same v. M. Brutton*, 341*l.* 6*s.* 11*d.* The Master disallowed both of these bills of costs. The Defendant excepted to the report.

The exceptions depended on the following questions:—1st. Whether the Master ought not to have allowed so much of the bills of costs as was due from the testatrix to *Brutton* and *Ford*, her solicitors, at the time of her death, which amounted to about 30*l.* 2nd. Admitting that *Brutton*, being the executor, could not charge the testatrix's estate with costs to himself, *Robinson v. Pett* (a), *Marshall v. Holloway* (b), *Carmichael v. Wilson* (c), *New v. Jones* (d), *Moore v. Frowd* (e), or to himself and his partner *Ford*, *Collins v. Carey* (g); yet, inasmuch as, being solicitors practicing in the country, they were obliged to employ a town agent,—whether the Master ought not,—from the death of the testatrix until January, 1821, when the agreement, dissolving the partnership between *Brutton* and *Ford*, took effect,—to have allowed, besides other sums actually paid out of pocket, a moiety of the costs in the suits, being the proportion which it the custom for the town agent to receive. 3rd. Whether the Master ought not, after the dissolution of partnership between *Brutton* and *Ford*, to have "allow- [*375] ed so much of the Defendant's claim as consisted of the bills of costs of Mr. *Ford* alone.

(a) 3 P. Wms. 249; and see 2 Atk. 60.

(b) 2 Swans. 452—453.

(c) 2 Moll. 350: S. C. 4 Bligh, N. S. 146.

(d) 9 Bythewood Convey. by Jarman, p. 338.

(e) 3 Myl. & Cr. 45.

(g) 2 Beav. 128.

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Mr. *Simpkinson* and Mr. *Prior* supported the exceptions.

Mr. *Temple*, Mr. *Lovat*, and Mr. *Walpole*, in support of the Master's report.

On the first point, the costs incurred in the testatrix's lifetime, the Plaintiff contended that, if the Defendant had any claim on this ground, it ought to have been made in her capacity as executrix of *Brutton*, or by *Ford*, as a debt due from the testatrix's estate, and not by way of discharge: that it could not be claimed in discharge, unless it had been retained by *Brutton* in his lifetime, of which retainer there was no evidence. The Defendant contended that such retainer ought to be presumed. In addition to the cases mentioned above, the following authorities were cited:—*Layfield v. Layfield* (a), *Padget v. Priest* (b), *Curtis v. Vernon* (c), *Loomes v. Stothard* (d), *Player v. Foxhall* (e), *Spicer v. James* (g), *Plumer v. Marchant* (h).

VICE-CHANCELLOR:—

A claim was made by the Defendant *Margaret Brutton* to have an allowance made to her in respect of certain costs which she insists had either been paid by, or by the estate of, her intestate, *Brutton*, or which that estate was liable to pay. It does not [*376] distinctly appear whether there had been any payment, or whether it was merely a question of liability. These costs extended over many years, and have been considered with reference to the circumstances existing during three distinct periods. The first period was in the lifetime of the testatrix. *Brutton* was a partner with *Ford*; and they, in the lifetime of the testatrix, acted as her solicitors, and a sum of 80*l.*, or thereabouts, became due from her to the two. The master disallowed this claim. The argument on behalf of *Margaret Brutton* was, that, inasmuch as *Brutton* was the executor of the testatrix, he had a right to retain this debt, and

(a) 7 Sim. 172.

(b) 2 T. R. 97.

(c) 3 T. R. 587.

(d) 1 Sim. & St. 458.

(e) 1 Russ. 538.

(g) 2 Myl. & K. 267.

(A) 3 Burr. 1380; Williams on Executors, Vol. 2, p. 835 et seq., 3rd ed.

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therefore, in the way of retainer, it ought to have been allowed in discharge of his estate. Now it appeared,—in fact it was the case of *Margaret Brutton* to say,—that from January, 1821, the partnership between *Brutton* and *Ford* was dissolved, in consequence of *Brutton*, owing to a paralytic attack, having become totally incapable of business. The affidavits on that point are very strong. The business was afterwards carried on by *Ford* alone. It does not appear that *Brutton* had ever exercised his right of retainer. I do not mean to question the proposition that one of two partners to whom a debt is due, being made an executor, might retain that debt. The same reason seems to apply in that case as to a case of his being a sole creditor. In point of fact, however, there was no retainer, nor anything done that shewed an intention to retain. In 1821, this arrangement took place; in 1827, Mr. *Brutton* died, and before any right of retainer had been thought of, the legal interest in the debt had wholly devolved on *Ford* alone, and, therefore, the reason which would give the right of retainer had ceased to exist. It appears to me that that alone is sufficient to dispose of the case; but I desired to look at the affidavits, to see whether the equitable interest had not also passed, for, if it had, that would be an additional consideration for holding that the right of [*377] retainer was extinguished. It appeared to me impossible to read the affidavits without understanding from them that Mr. *Ford* claimed to be absolutely entitled to all the profits of the business, up to the time of the arrangement of the business in 1821, including the debt in question.

[His Honour read the affidavits with reference to the illness and incapacity of *Brutton*, and the arrangement with his family and friends, by which *Ford* purchased all his interest in the partnership, as well in respect of the business which had been done, as of the good-will.]

I think, therefore, that, in equity as well as at law, *Brutton* had ceased to have any interest in the debt; and, there having been no retainer in fact, nor any evidence of intention to retain, that the Master's conclusion was right with respect to the costs comprised in the first period.

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The second period includes the time between the death of the testatrix and the dissolution of the partnership of *Brutton* and *Ford*; and, during that period, it appears that the Master has allowed all payments actually made by *Brutton*, with this exception,—*Mr. Brutton*, a solicitor in the country, had employed a London agent, and payments had been made to that London agent. The question before the Master was, whether he was to treat such payments as payments actually made, and which ought to be allowed, or whether he was to consider them as only a part of those profits which the Court does not allow an executor or trustee to make, and which he, therefore, could not claim. The reason why a trustee is not permitted to make a profit of the business which arises out of the office he holds, is, that he is bound to exercise a control over the solicitor he employs, to watch the proceedings, and see that they are proper; and the Court guards the performance of that duty, by excluding him from any pecuniary interest in the steps that are taken. If the application of that reasoning were carried to its extreme length, it appears to me it would go to exclude the executor from receiving the sums which have been allowed as payments, for it may be said that he had a pecuniary interest in conniving at improper steps being taken; but the Court does not go that extreme length. In this case, the Master has allowed the sums paid by *Brutton*, in the course of the proceedings during the period to which I am referring, and, I think, correctly allowed them. The Court invariably does so, unless there is some attempt to impeach the propriety of what has been done. Then the Court having so far said that the steps shall be recognised, the question is whether the Master ought not to have allowed the expenses paid to the agent, which stand upon the same footing as the sums actually paid; in point of fact, whether by pursuing that course he would not have done all which the Court affects to do, which is to deprive a solicitor and trustee of all profit from the business. The considerations on this point are so nicely balanced, that I have hesitated very much in disturbing the conclusion to which the Master has come; but, upon the whole, I think that he has drawn the line with more than necessary strictness, in stopping at

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the precise point at which he has made the allowance to cease. I think I may declare that the Master ought to have allowed the expenses actually paid to the agent; and refer it back to him to review his report, regard being had to that declaration. That will confine the alteration to that point; everything else will stand.

I have had great difficulty in knowing how to deal with *the claim for costs, incurred between the time of the [*379] alleged dissolution of partnership of *Brutton* and *Ford* and the death of *Brutton*. The Master, I understand, was of opinion, that, inasmuch as Mr. *Brutton* was incapable of acting, no one had power to dissolve the partnership for him: that he must be considered as having been a partner throughout, and, therefore, that the case will be governed by the same considerations which previously applied. It is not very material which way the case is taken. If he is to be considered as a partner, the Master was clearly right except as to the the agency, if there were any such, expences. I confess, however, that, as the Defendant's case is, that the partnership was dissolved,—the representative of *Brutton*, in fact, adopting and confirming the transaction, and as the family, who sold his share and took the benefit of such sale, do not affect to impeach the transaction, I think I am pursuing the strict course of justice in holding that the partnership was dissolved. But what difference does it make? I must now consider Mr. *Ford* as standing in one of two characters,—he was either a solicitor retained by somebody, or he was acting officiously. Then by whom was he retained? The original retainer was given by *John Brutton* to the firm of *Ford* and *Brutton*. When that partnership was dissolved, a new retainer would have been necessary, in order that *Ford* should be properly retained as the solicitor in the cause. Who could give him this retainer? I cannot upon these proceedings hold that Mr. *Brutton* gave it, for the whole case raised by *Margaret Brutton* is that, at the time of the dissolution in 1821, and thenceforward until his death, he was in a state of complete incapacity either to give a retainer or do any other act. The most favourable way in which I can therefore treat Mr. *Ford*, is as a solicitor who has acted officiously, and carried the *cause to a successful result. [*380]

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The consequence is, that which Mr. Baron *Alderson* held, and in which I agreed with him in *Hall v. Laver* (a), that those who claim the benefit of the suit,—not complaining of the mode of conducting it,—shall pay the costs of carrying it on, although they may not have employed the solicitor by whom it was prosecuted. This principle does not, however, help the Defendant *Margaret Brutton's* case, for the person to make application for the costs is not *Margaret Brutton*, but the solicitor who has so acquired a title to receive them. Mr. *Ford* might on that ground think fit to petition that the funds now in Court shall not go out until the proper costs are provided for, but this is not that proceeding. It is the claim of *Margaret Brutton*, who never retained him, and who is a mere stranger to the transaction; and I do not think I can possibly do otherwise than confirm the Master's report; although the disallowance of this sum may merely produce a circuitry, and ultimately throw the same costs on the fund in another shape.

[*381]

*FISK v. NORTON.

1843 : 27th and 31st January.

A person to whom a legacy or an annuity is given, to be paid out of the residue after the death of the legatee for life of such residue, is not a necessary party to a suit for administration of the estate, brought by legatees of aliquot shares of the ultimate residue.

Form of decree for taking the accounts in an administration suit, in case all the persons interested should not be parties at the hearing. [1]

The testator, after giving various legacies and annuities, gave the residue of his personal estate to his executors, upon trust to invest the same in government or real securities, and pay the dividends, interest, and annual income unto his sister *Sarah*, for and during the term of her natural life; and from and after the decease of the said *Sarah*, if his sister *Elizabeth* should be then living, to pay out of

(a) 1 Hare, 571, 575.

[1] *Say v. Creed*, 3 Hare, 460.

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the said dividends, interest, and annual proceeds, unto the said *Elizabeth*, a weekly sum of twenty shillings for her life; and upon further trust, to pay and apply the interest, dividends, and produce of 1000*l.*, part of the said trust-mones, into the hands of his niece, *Sarah Fisk*; and after the decease of *Sarah Fisk*, the testator gave the said principal sum of 1000*l.* to her children. After some other gifts in a similar form, the testator gave and bequeathed all his personal estate which should remain after payment of the said legacies, annuities, and weekly sums, to be equally divided between and amongst nine persons therein named; and in the case of the death of any of them before his sister *Sarah*, leaving issue, he gave their shares to their children. The bill was filed in the lifetime of *Sarah*, the tenant for life, by parties entitled to two of the nine residuary shares, against the executors, and the parties claiming the other seven residuary shares, for the administration of the estate.

At the hearing, Mr. *Walker*, Mr. *Lovat*, Mr. *Jeremy*, Mr. *Terrell*, and Mr. *Bevir* appeared for the several Defendants.

It was objected that the testator's sister **Elizabeth*, [*382] and his niece, *Sarah Fisk* (a), were legatees of parts of the residue, and necessary parties to the suit.

Mr. *Roupell* and *Rolt*, for the Plaintiffs, said that the sister *Elizabeth* and the niece were merely pecuniary legatees, whose legacies, instead of being paid before the interest of the tenant for life commenced, were to be paid after that interest had determined. *Pidge-ly v. Rawling* (b).

THE VICE CHANCELLOR held that they were not necessary parties.

The parties entitled under the gift over to the issue of the residuary legatees dying before the time of distribution being numerous, it was apprehended that some of them were not parties to the suit, and that the decree might in that case, be ineffectual; and it was ordered that the Master should inquire and state to the Court "whe-

(a) The objection applied as to others of the legatees under the will, in a like situation.

(b) 1 Y. & C. Chan. Ca., 562.

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ther there are any and what children of (*the eight surviving residuary legatees*) now living, and whether (*a deceased residuary legatee*) left any and what children him surviving, and whether such children are now living or dead ; and, if dead, when they died, and who is or are their personal representative or representatives : and also inquire and state whether any and what assignments or incumbrances have been executed or created by the several parties interested in the residue of the said testator's estate, or any or either of them, and what person or persons is or are now interested in the said residue by virtue of any such assignments or incumbrances ; *and if the Master shall find that all the children now living of the said (*eight surviving residuary legatees*), and the children now living, and the personal representatives of such children, if any, as are now dead, of the said (*deceased residuary legatee*), and also all the incumbrancers on the said residue, are parties to this suit, or to any suit supplemental hereto in which a decree shall have been made for carrying on the decree and proceedings in this suit, and giving the parties thereto the benefit of this suit and decree, then let the Master take an account of the personal estate of the testator," &c.

 TIPPING v. CLARKE.

13th and 16th February.

The 38th Order of August, 1841, enabling a Defendant by answer to decline answering any interrogatory, from answering which he might have protected himself by demurrer, applies as well where the demurrer constituting the protection must have been a demurrer to the relief, as where it would have been a demurrer to the discovery only. [1]

Under the 74th Order of April, 1828, the Master does not, on the ground of immateriality, overrule exceptions for insufficiency, unless it is clear that the question cannot be material. If the materiality be doubtful, the case is not within the Order.

Construction of an answer, containing a general denial of the facts charged, in the terms of the charge, with a saving so far as the other statements in the answer admits or explains them.

THE Plaintiff, a factor, had dealings with the Defendant, a mer-

[1] See *Wood v. Drake*, post. 647. *Kaye v. Wall*, 4 Hare, 127.

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chant, and disputes arising between them, the Defendant, in a letter to the Plaintiff, stated in effect, that he had, with much time and trouble, acquired a knowledge of the contents of the Plaintiff's books, not only relating to his (the Defendant's) account, but also to the accounts of all the Plaintiff's other Irish friends, and that he (the Defendant) intended to call a meeting of the latter, his object being to make a public exhibition of the Plaintiff's books. The Plaintiff thereupon filed his bill, charging that the Defendant had by surreptitious and fraudulent means obtained access to the Plaintiff's accounts, books, and other documents, relating to the Plaintiff's business, and had by the like means made or obtained copies thereof, not only in reference to his own transactions with the Plaintiff, but *also in reference to the Plaintiff's ['384.] dealings with other persons, and in particular with various connexions and friends of the Plaintiff in Ireland and elsewhere, in which the Defendant had no concern. The bill charged that the Defendant ought to set forth a list and description of all copies of, and extracts or entries from, and of all other particulars respecting the said accounts, books, and documents, relating to such transactions, at any time or in any manner obtained by him, or which were in any way then in his possession or power or under his control, or to which he had any means of access, and ought also to set forth how and when, and from whom, he obtained the same, and what means of access he then had thereto, and when he parted with the custody of any of the said several particulars which were not then, but formerly were, in his possession or power, or under his control, and where the same then were, and what had become thereof.

The bill inquired, 1st, Whether it was not true that the Defendant had by surreptitious and fraudulent means, or by some and what means obtained access to the Plaintiff's accounts, books, and other documents relating to his business, or to some and which of them. 2ndly, Whether he had not in some and what manner made or obtained copies, or a copy, or extracts, or an extract, therefrom, or of some and what part or parts thereof. 3rdly, Whether he had not made or obtained such copies or extracts, not only in reference to his own transactions with the Plaintiff, but also in reference

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to the Plaintiff's dealings with other persons, and in particular with various, or some and what friends of the Plaintiff in Ireland and elsewhere, with which he had no concern. 4thly, The bill called upon the Defendant to set forth a list and short description of all

copies of, and extracts or entries from, and of all other
[*385] the particulars aforesaid in his possession or power.

5thly, How and when, and from whom, he obtained the same, and what means of access he then had thereto: and 6thly, When he parted with the custody of any of the said several particulars which were not then, but formerly were, in his possession or power, and where the same then were, and what had become thereof.

The bill prayed that the Defendant might be restrained by injunction from printing or otherwise copying, and from publicly exhibiting or making known, and from distributing or parting with any copies, or otherwise in any way publishing the said accounts, books, and documents, and any copies of, or extracts from, the same, and might be decreed to deliver up to the Plaintiff, or to destroy, all such copies and extracts; and might also be decreed to pay the costs of the suit.

The Defendant, by his answer, said that, suspecting the Plaintiff had rendered him false statements of the sales of the goods consigned to him by the Defendant, and appropriated to his own use part of the proceeds which he ought to have accounted for to the Defendant, he (the Defendant) made inquiries, and exerted himself to obtain information respecting the matters aforesaid, and to ascertain the true state of the case with respect thereto, and by the means aforesaid he obtained information respecting it, relating to the Defendant's own affairs and property, and the dealings of the Plaintiff, as his factor, in respect thereof, and the accounts relating to the same, and the Defendant had some private memorandums relating to the same matters, and of the information so obtained, which memorandums were written on several separate papers, and were in the Defendant's possession; and the Defendant had a few

other memorandums of a similar nature, which he was
[*386] then unable to find, although he had searched for the same, and, in consequence, believed that the same had

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been lost or destroyed, and was unable to set forth any other description or account thereof, or when the Defendant parted with the same, or where the same then were, and what had become thereof. And the Defendant insisted that he was entitled to retain all such memorandums, and that he ought not to be compelled to produce or make any discovery respecting the same or any of them, for they related exclusively to the Defendant's property and goods, and the sales thereof, with the exception only, that two of the memorandums contained notes made by the Defendant of information obtained by him, of differences between the accounts of the proceeds realized and received by the Plaintiff, from merchandize of the Defendant, and also of some other persons therein mentioned, being also connections in trade of the Plaintiff, he having, as the Defendant believed, improperly, unfairly, and fraudulently retained and appropriated to his own use the sums constituting such differences; but the Defendants denied that he had, surreptitious and fraudulent means, or by any means *except as aforesaid*, and by an order in a suit in which he was Plaintiff, obtained access to the Plaintiff's accounts and books, or other documents, or any of them, or *save as therein mentioned* had, in any manner, made or obtained copies or a copy thereof, or extracts or extract therefrom, or of any part thereof,* and the Defendant said that he had in his possession or power the memorandums or papers thereinbefore mentioned and described, which he insisted he was not bound to produce or discover in what manner to the Plaintiff, and that the Plaintiff had not by his bill shewn any ground, or made any case, entitling him to the production or discovery thereof, and, *except as aforesaid*, the Defendant denied the possession of any documents,—following the terms of the interrogatory.

*The Plaintiff took six exceptions for insufficiency, in [*387] respect of the interrogatories which are above distinguished. The Master overruled the exceptions. Upon exceptions to his report,

Mr. Roupell and Mr. Rolt submitted that the answer was evasive, and that, even supposing the bill were demurrable, the 38th Order of August, 1841, was not intended to alter the rules of pleading, to

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the extent of giving to an answer the effect of a demurrer to the relief. It was intended only to give to an answer the effect of a demurrer to the discovery. On the title to relief they cited *Gee v. Prichard* (a).

Mr. *Bazalgette*, for the Defendant, argued that the interrogatories were in terms answered, and that the specific answers, referred to in the general denial, applied to all the facts which were material to any relief that could be given; for the Plaintiff was not entitled to any part of the relief prayed with respect to the account of his dealings with the Defendant himself, whatever might be his title to relief with respect to the accounts of the Plaintiff's dealings with third persons. Under the 38th Order of August, 1841, the Master had, therefore, correctly overruled the exceptions, as to enquiries leading to that part of the relief which might have been demurred to; and the inquiries not covered by that principle were properly held to be immaterial, under the power given to the Master by the 74th Order of April, 1828.

VICE-CHANCELLOR, after stating the subject of the bill, and of the exceptions:—

I have, in this case, to consider three points: first, [*388] whether the Defendant has sufficiently answered the matter of the exceptions, admitting that he has verbally answered the interrogatories: secondly, whether (if he has not sufficiently answered) it is material to the relief prayed, that he should answer the matters in question, with reference to the 74th Order of April, 1828: and thirdly, whether the Defendant is relieved from the necessity of answering by the effect of the 38th Order of August, 1841. With regard to the first point, whether the Defendant has answered or not, I make the observation, which is very commonly and usefully made by all Judges who have to consider this question,—which is, that, if the Defendant will simply answer in the terms of the bill, he avoids all difficulty on the subject: but, if instead of doing so, he gives an answer which is not precise with

(a) 2 Swans. 402.

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reference to all the matters on which he is interrogated, and then endeavours to shelter himself under a general denial, coupled with the words "except as aforesaid," or similar expressions, he makes it often difficult to decide whether the answer is sufficient or not. The rule, since I have known the practice of the Court, has been, that wherever the Defendant denies the bill to be true, "except as appears by the other parts of the answer," if there be not found on the answer a clear and sufficient statement, which, to a reasonable extent, meets the whole case, the answer is deemed to be evasive. Then does the previous part of the answer to the subject of the three first exceptions meet the questions put by the bill, and explain the matters, so far as it relates to the allegation that the Defendant has had access to, and has taken copies or extracts from, the Plaintiff's books, and that such copies and extracts relate to accounts between the Plaintiff and third persons, as well as between him and Defendant? I am clear that the Defendant has not given any such sufficient or explanatory statement. "[His [389] Honor read that part of the answer.] The statement the Defendant makes is perfectly consistent with the supposition that the Defendant may have had access to, and taken copies and extracts from, the books, relating as well to his own affairs as to the affairs of other persons. It is a general denial, "except as aforesaid;" but there is not any previous allegation which excludes the suggestions to which this qualified denial applies. It is a mere general denial, in answer to a specific charge, with which the Court never requires a plaintiff to be satisfied. The first, second, and third exceptions must, therefore be allowed.

The fourth exception stands on a different footing, for the substance of the answer is, that the Defendant has in his possession no documents relating to the dealings between the Plaintiff and other persons, except two,—that those two have upon them certain memoranda to the effect mentioned in the bill, as to the transactions between the Plaintiff and other persons therein named. The answer would enable the Court, on motion, to order the production of those two documents. If the documents produced under that order should not correspond with the representation in the answer, or the names

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of the persons with whom the dealings took place should not appear on them, or if the memoranda upon them do not agree with the description in the answer, the Plaintiff may move for an order that the Defendant should make a further discovery on oath ; and enable the Plaintiff to obtain the production of the identical documents. If the documents correspond with the description in the answer, that *prima facie* will be sufficient to identify them, and shew that the order of the Court has been complied with. It may be answered that it would be possible for the Defendant to substitute other documents for those so described ; but the same may be said of almost every document. If they were distinguished by several marks ['390] *and successive numbers, the Court cannot guard against the possibility of fraud by substitution of other documents bearing similar marks or numbers. With respect to those two documents I think the answer is sufficient. The other documents, however, the Defendant does not even affect to number ; and, supposing he is bound to produce or give them up, the answer is not sufficient.

The subject of the fifth exception, when and from whom the Defendant obtained the documents, falls within the observation I have already made. Until the Defendant has given a specific answer to the question, whether he has the documents in his possession, I cannot be satisfied with a general answer from him.

The answer to the sixth exception is sufficient for a different reason ; and I have very little doubt that the answer was meant to be sufficient, and that the Plaintiff will not be benefited by my allowing the exception ; but the answer is made evasive in saying that the Defendant cannot set forth when he parted with the papers or memoranda, and what had become thereof. When a Defendant answers conjunctively by saying he is unable to answer half-a-dozen things, and he does not add " or any of them," it is obvious that the answer may be evasive.

The next point is with regard to the materiality of the exceptions. The 74th Order directs the Master to consider the relevancy or materiality of the question or statement. The Master undoubtedly has always to read the bill, and to see what the scope of it is,

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on the question of materiality ; but the Order is not imperative that the Master shall weigh that question with the nicety which is necessary on questions of a right to property ; but—having regard to it,—if the statement is clearly immaterial, he is to take that circumstance into account in *determining [*391] on the sufficiency of the answer. If the Plaintiff is entitled to relief at the hearing of the cause, or if the effect of the bill being demurrable (supposing it to be so) is not to protect the Defendant,—the Plaintiff may have occasion to prove that the Defendant has copies of his books, which he has threatened to publish ; and that the Plaintiff has a right to restrain him from publishing them. It is impossible to say the discovery in this case may not be material. The fact of having access to the books may be very material. It may be an important link in the chain of evidence to prove that the Defendant in truth had taken the copies or extracts. It is material also with a view to the injunction, for if I had to decide that question on motion, I might probably say that it involved so much difficulty, that I could not try the cause before the hearing ; but then the mischief of publication being one which the Court could not repair, and which could scarcely be adequately repaired in damages, I might possibly grant an interim injunction until the right was decided. Again, at the hearing, the Plaintiff may be entitled to have the documents, or some of them, delivered up to be cancelled, or to have them impounded ; and if any relief of that kind is to be given, the Plaintiff would be bound prove in some way what the documents are ; and whatever he is bound to prove at the hearing, he is at liberty to prove, if he can, by the oath or admission of the Defendant. The documents must, therefore be so far described that the Court may be in a condition to make a decree at the hearing, if the Plaintiff should be entitled to a decree. The answer may be material also with regard to the costs of the suit. I give no opinion on the right of the Plaintiff to the production of the documents : that is not the present question.

The only other point arises on the suggestion that *the [*392] bill is demurrable, and that, in such case, the 38th Order of August, 1841, gives the Defendant the benefit of a demurrer in this form.

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Those who are familiar with the old cases on the subject before Lord *Thurlow*, Lord *Rosslyn*, and Lord *Eldon*, know the contest which for a long time existed on the point, whether the Defendant answering could refuse to answer fully, unless the question itself was immaterial, or a breach of professional confidence, or calculated to subject him to pains and penalties, or any question of that nature, which the Court never obliges a Defendant to answer, even where the right to relief is admitted. In consideration of those cases, a distinction was constantly taken in argument between a bill which was demurrable, and on which the Court might, therefore, see that the discovery would be useless, and the case of a plea or answer where the question of right to discovery depended on a fact, the truth of which the Court could not ascertain before the hearing of the cause. But this distinction was not allowed by the Court,—Lord *Eldon* saying the Master could not try whether the bill was demurrable. Now the 38th Order was certainly intended to alter this practice where the bill was clearly demurrable; and I conceive that, as the case goes first before the Master, the Court, by the order in question, placed the Master in the same situation as the Court in that respect; and although the general rule is, that a bill must be so stated as to show that the Plaintiff would be certainly entitled to relief, and it is not sufficient to say he may be entitled to it, yet the Court very commonly exercises a discretion in saying, that a question is of too much difficulty to decide upon demurrer.[1] The right to discovery in cases like the present may be put on three grounds. First, on the ground of property in the books, which

[1] In *Fairthorne v. Weston*, 3 Hare, 398, the Vice Chancellor held that the 38th order of 1841, applied to a case where the bill is generally demurrable. That it was meant so to apply, he said that the masters entertained doubts whether that was the construction of the order, and whether they had any right to enquire whether the bill was demurrable or not, and that it was said that they thought it compared to cases where they would be only to a particular question. But he held the order could not be so limited. The order was intended to meet those oppressive cases, where the defendant being practically obliged to give some discovery, was, by the effect of the technical rule, prevented from refusing discovery to any part of the bill, although part of such discovery might be injurious to him, and where the bill was demurrable, unless to the plaintiff. See *Drake v. Drake*, *Fest*, p. 647. *Weed v. Weed*, 3 Hare, 411.

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depends on the statute of Anne; secondly, on ^a [*293] breach of contract between the parties; and the third ground, which is common to all cases, is, that the court interposes to prevent a positive wrong, the consequences of which cannot be adequately measured or repaired in damages. I do not mean to give any opinion in this stage of the case, how far these principles may ultimately apply to it, or whether or not a party has a property in the contents of his books of account. To draw a line between different classes of books, on the question of property, requires much consideration. I cannot, without argument, decide that there may not be a property in these books in the Plaintiff, as the bill charges there is. Looking at the case with reference to contract, I cannot say that the Defendant shall not make known to the world his own dealings with another party; but it is clear, that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk; if the Defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the Plaintiff, and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract. I cannot say that a serious injury may not arise by the publication of accounts under such circumstances; nor am I in a condition to say, with any satisfaction to myself, that this is not a case in which the Court will give relief of the nature which is sought. The question arising only incidentally, on exceptions to the answer, and the answer being evasive, I think the Master should have allowed the exceptions.

Exceptions to the report allowed.

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*FULLER v. BENETT.

1843: 22nd, 23rd, and 24th, February. 3rd March.

After the commencement of a treaty for the sale of an estate by A., and the purchase of it by B.,—A. agreed to give C. a mortgage on the estate as a security for an antecedent debt, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards ceased to be prosecuted for upwards of five years, during part of which time the suit of an adverse claimant of the estate was pending. A then died, and B. purchased the estate at a lower price from the heir and devisees of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B. from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage:—*Held*, under the circumstances of the case, that B. and D. had, through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage.

In February, 1831, Sir *J. J. Dillon*, who was the owner of an undivided moiety of an estate called the *Hatch* estate, in *Wiltshire*, subject to a mortgage to *Mollan*, commenced a treaty with the Defendant *Benett*, the elder, for the sale to him of the said moiety. The draft of an agreement was drawn up in writing by *J. Benett*, the elder, and altered and signed by Sir *J. J. Dillon*; the alterations did not appear to have been adopted by *Benett*, but the abstract was delivered, and a correspondence commenced between Sir *J. J. Dillon*, and Messrs. *Farrer & Co.*, the solicitors of *Benett*, with respect to the title, with a view to the purchase. In the draft of agreement as made by *Benett* and signed by Sir *J. J. Dillon*, the stipulated purchase-money was 18,000*l.*

On the 18th of November, 1831, Sir *J. J. Dillon* being indebted to *P. M. Chitty*, a solicitor, in respect of costs and disbursements, signed a memorandum in writing, whereby he agreed to execute a mortgage to *Chitty* of the *Hatch* estate for securing such sum of money as was due from him to *Chitty*, on the balance of account not exceeding the sum of 2,000*l.*, as soon as such mortgage could be prepared. The draft of a mortgage-deed was afterwards prepared and sent to Mr. *Stephens*, the solicitor of Sir *J. J. Dillon*, but the proposed deed was not executed.

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Chitty, by way of security for a debt which he owed to the Plaintiffs *G. and R. Fuller*, who were bankers, in ['395] March, 1832, assigned to the Plaintiff *Smith*, as trustee for them, the debt owing to him (*Chitty*) from Sir *J. J. Dillon*, and all securities for the same. On the 26th of March, 1832, Messrs. *Smith & Allistons*, the solicitors of the Plaintiffs, gave Messrs. *Farrer & Co.*, the solicitors of *J. Benett* the elder and *J. Benett* the younger, notice of the assignment by *Chitty* to the Plaintiffs, of the debt for which he held the undertaking to execute a mortgage of the estate contracted to be sold to *Benett*, and requested to be informed of the time when the purchase was to be completed, that they might attend and receive the amount due to *Chitty*. In November, 1832, *Chitty* became bankrupt.

In August, 1832, Sir *Hyde Parker* filed his bill against Sir *J. J. Dillon*, the Defendant *J. Benett*, the elder, and others, and thereby claimed to be equitably entitled to the said moiety of the *Hatch* estate. The Defendant *Benett*, the elder, by his answer in that suit claimed the benefit of the contract of sale; but did not acknowledge that he was bound by it. The cause (*Parker v. Dillon* and others) was heard in November, 1835, and the bill was dismissed with costs. After the termination of *Parker's* suit, Sir *J. J. Dillon*, being desirous of enforcing the performance of what he considered to be the contract he had made with the Defendant *J. Benett* the elder, for the sale of the *Hatch* estate, with which *Benett* declined to proceed, caused a bill to be prepared for that purpose; but, in February, 1837, before, further steps were taken, Sir *J. J. Dillon* died, having by his will devised all his estates, including the said moiety of the *Hatch* estate, to his sister *Henrietta Dillon*, who was also his heiress-at-law, and having also appointed her his residuary legatee and sole executrix.

Soon after the death of Sir *J. J. Dillon*, an agreement was entered into between *Henrietta Dillon* and the Defendant *J. Benett* the elder, by which the latter, on 'behalf of ['396] himself and *J. Benett* the younger, agreed to purchase the said moiety of the *Hatch* estate, and to accept the title as it then stood, at the reduced sum of 11,500*l.* The Plaintiffs alleged

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that this was merely a completion of the former contract with an abatement of price: the Defendants alleged that it was an entirely new agreement having been abandoned. By indentures, dated the 2nd and 3rd of October, 1837, *Henrietta Dillon* in consideration of 11,500*l.*, paid by the Defendants *J. Benett* the elder and *J. Benett* the younger, to her^s and to her order, conveyed the said moiety of the *Hatch* estate to the use of *J. Benett* the elder and *J. Benett* the younger, as therein mentioned. The purchase-money was applied in paying off the mortgage to *Mollan* and other incumbrances (not including the claim of the Plaintiffs under the agreement of November, 1831), and the balance, amounting to 8820*l.*, was paid to *Henrietta Dillon*.

By indentures dated the 23rd and 24th of June, 1839, *J. Benett* the elder, and *J. Benett* the younger conveyed the *Hatch* estate, together with other estates, to the Defendant *Edward Majoribanks*, and his heirs, by way of mortgage for securing 120,000*l.* and interest. Messrs. *Farrer & Co.* were the solicitors of both the Defendants, *Benett* and *Majoribanks*, in the business of this mortgage.

The bill was filed in April, 1840, against *J. Benett* the elder, *J. Benett* the younger, *E. Majoribanks*, *Henrietta Dillon*, and the assignees of *Chitty*, stating that the Plaintiffs had then lately discovered that the purchase was completed, and the *Hatch* estate conveyed to the several Defendants by the deeds of October, 1837, and June, 1839; and praying that an account might be taken of the debt due to the Plaintiffs from *Chitty*, secured by the agreement of March, 1832, and to *Chitty* from Sir *J. J. Dillon*, secured by the "agreement of November, 1831, and

that the Defendants *Henrietta Dillon*, *J. Benett* the elder, and *J. Benett* the younger, and *E. Majoribanks*, might be decreed to pay to the Plaintiffs the amount, not exceeding 2000*l.*, which should be found due from *Dillon* to *Chitty* at the date of the agreement of November, 1831, with interest, in part satisfaction of the debt secured to the Plaintiffs by the agreement of March, 1832, with the costs of the suit; and in default of such payment that the said Defendants and the assignees of *Chitty* might be foreclosed of the equity of redemption of the said moiety of the *Hatch* estate, and

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that the said Defendants might be decreed to convey the said moiety to the Plaintiffs, and deliver up to them the deeds relating thereto, and the possession thereof.

The Defendants *J. Benett* the elder, *J. Benett* the younger, and *E. Majoribanks* claimed to be purchasers of the *Hatch* estate, with out notice of the agreement of November, 1831. The Defendant *J. Benett*, the elder, said that there was, before that agreement, a contract binding in law upon *Dillon* for the sale of the estate, although it was not in law binding upon him (the Defendant); that such agreement was abandoned after the institution of the suit of *Parker v. Dillon*; and that the subsequent contract with the Defendant *Henrietta Dillon* was an entirely new transaction, having no reference to the former; that no mention was made in the conveyance of any former treaty or contract; and that the purchase money was paid to *Henrietta Dillon* as the vendor, and not the personal representative of Sir *J. J. Dillon*. *Henrietta Dillon* was out of the jurisdiction, and did not appear in the cause.

Evidence was entered into on both sides, but the material facts of the case were scarcely in dispute. The questions were with regard to the inferences or conclusions which [*398] were to be drawn from the particular facts. It did not appear whether the notice which they had received of the agreement of November, 1831, was or not in the actual recollection of Messrs. *Farrer & Co.* at the time of the completion of the purchase by their clients, the Defendants *Benett*, and the payment of the balance of the purchase-money to *Henrietta Dillon*. Mr. *Parkinson*, the partner in the firm of *Farrer & Co.*, who acted in this business, was examined as a witness, and the following passage in his depositions was noticed in the judgment:—

“I have some recollection that the produced notices (of the agreement and assignment) were, on some occasion previously to the death of the said Sir *J. J. Dillon*, referred to, or noticed by me, in some conversation or conversations which I then had with the said *J. Benett* the elder; but at what precise time between the date of the said last-mentioned documents I had these communications, I cannot state as to my recollection or belief; nor can I recollect to

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what extent I apprised the said *J. Benett*, the elder, of the contents of the said last-mentioned documents, and even if I could, I should decline to state the same, as I consider the communications between myself and my client, the said *J. Benett*, the elder, as confidential and privileged. I am confident that, after the death of the said Sir *J. J. Dillon*, neither I nor any of my partners had any conversation with the said *J. Benett*, the elder, on the subject of the said produced paper writings, or made known to him the contents thereof, as at that time the treaty for the purchase of the said estate had been put an end to; and both my partners and myself considered that there was no binding contract subsisting between the parties."

And the following passage in the depositions of the same witness was also read in the judgment :—

['399] "I believe that neither I nor any of my partners ever communicated to the said Plaintiffs or their solicitors the result of the said last mentioned suit, or the completion of the purchase of the moiety of the said estate by the said *John Benett* the elder, and *John Benett* the younger, inasmuch as I and my partners considered that there was no binding contract between the said Sir *John Dillon* and the said *John Benett* the elder. These matters were not purposely kept secret from the said Plaintiffs or their solicitors, by myself, or my partners, or our client; we certainly did not consider ourselves under any obligation to give the said Plaintiffs or their solicitors, spontaneously, any notice of the termination of the said suit, or of the completion of the said purchase by the said Defendants, *John Benett* the elder, and *John Benett* the younger; but we should not have refused to give the said Plaintiffs or their solicitor any information thereof, if they had made any inquiry respecting the same; such inquiry or information, however, was never, as far as I recollect or believe, made or sought after. I cannot state, as to my knowledge or belief, whether the said Plaintiffs and their solicitors were wholly or in any way ignorant of the termination of the suit, instituted as aforesaid, by the said Sir *Hyde Parker*, or of the completion of the said purchase by the said Messrs. *Benett*, until a short time previous to the institution of this suit." At the hearing,

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Mr. Temple and Mr. Heathfield, for the Plaintiffs.

Mr. Purvis and Mr. Sidebottom, for the Defendants, *J. Bennett* the elder, and *J. Bennett* the younger, argued that the vendor, after he had bound himself by a contract for sale, could not charge the estate by the agreement to mortgage in ; that there had been laches, or at least negligence on the part of the Plaintiffs, in suspending their claim from 1832 until after the purchase-money was paid ; that the contract with *Henrietta Dillon* was [*400] an entirely new and distinct transaction ; and that it was neither reasonable in fact, nor consistent with law, to deem that the solicitor, after such a lapse of time, had the circumstances of the former transaction present in his mind, so as to affect his client with constructive notice. They contended also, that the bill was not correctly framed, supposing the Plaintiffs were entitled to relief ; for it should have prayed that a proper mortgage-deed might be executed, and not a foreclosure.

Mr. Romilly and Mr. Giffard, for *E. Marjoribanks*.

Mr. Hislop Clarke, for the assignees of *Chitty*.

The following cases were cited :— *Fitzgerald v. Lord Falconbery* (a), *Brotherton v. Hatt* (b), *Worsley v. Lord Scarborough* (c), *Le Neve v. Le Neve* (d), *Yeates v. Groves* (e), *Hamilton v. Royse* (f), *Dawson v. Ellis* (g), *Mountford v. Scott* (h), *Winter v. Lord Anson* (i), *Hargreaves v. Rothwell* (k).

THE VICE-CHANCELLOR, at the conclusion of the argument, stated his opinion to be, that there was no complete contract between *Dillon* and *Bennett* before the agreement of November, 1831, but that the matter was then in treaty only ;—that there was no ground for imputing laches to the Plaintiffs ; and that the record was not

(a) *Fitzgibbon*, 213.

(b) 2 Vern. 574.

(c) 3 Atk. 392.

(d) 3 Atk. 646.

(e) 1 Vea. jun. 280.

(f) 2 Sch. & Lef. 315, 327.

(g) 1 J. & W. 524.

(h) T. & R. 274.

(i) 1 S. & S. 434 ; S. C. 3 Russ. 488.

(k) 1 Keen, 154.

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improperly framed, so as to preclude the Plaintiffs from obtaining relief, if upon the merits they were entitled to it.

[*401] *VICE-CHANCELLOR :—

Referring to what I said on a former day, the only question which I have to try is that of notice or no notice to *Benett* and *Marjoribanks* of the contract between *Chitty* and Sir *J. J. Dillon*.

In order to understand the point of law upon which the answer to the question depends (for the material facts are not substantially in dispute), it is necessary only to state, that Mr. *Parkinson*, of the firm of *Farrer & Co.*, on behalf of that firm, was the solicitor and legal adviser of Mr. *Benett* in and throughout his original treaty with Sir *J. J. Dillon*, in February, 1831, and thenceforward until the institution of the suit of *Parker v. Dillon*, in November, 1832 ;—that the same firm (acting by Mr. *Banister*) were the solicitors for Mr. *Benett* in the cause of *Parker v. Dillon*, in which Mr. *Benett* insists, by his answer, that he held Sir *J. J. Dillon* bound by a contract for sale of the *Hatch* estate ;—that Messrs. *Farrer & Co.* by Mr. *Parkerson* continued to act for Mr. *Benett*, in the transaction respecting the alleged sale of the *Hatch* estate, from the month of November, 1835, (the date of the dismissal of Sir *Hyde Parker's* suit), until the death of Sir *J. J. Dillon*, in 1837 ;—that he afterwards, in the same character, acted for Mr. *Benett* in treaty between that gentleman and Miss *Dillon*, which terminated in the agreement for sale and purchase in October, 1837 ;—and that he or Messrs. *Farrer & Co.* were the solicitors for Mr. *Marjoribanks*, as well as of Mr. *Benett*, in the transaction which terminated in the mortgage of June, 1839. Mr. *Parkinson* has been examined by the Defendants, or some of them, as a witness in the cause, and cross-examined by the Plaintiffs. He does not controvert the fact of notice given to his house by *Smith & Allistons* in [*402] 1832, nor his recollection of that notice in 1835, 1837, or 1839. His evidence upon this point tends the other way, if that were material. [His Honor read that part of Mr. *Park-*

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inson's deposition which has been already stated (a).] I should here observe, that the notices I have referred to as having been sent by *Smith & Allistons* to Messrs. *Farrer & Co.* in March, 1832, come out of the possession of the Defendants *Benett* in this cause; and that there is some evidence that the notices formed the subject of a conversation between Mr. *Parkinson* and Mr. *Benett* in the lifetime of Sir *J. J. Dillon*. It is not, however, upon these facts that my opinion on this case has been formed.

The Plaintiffs have argued that the treaty for the purchase of the estate, which commenced in February, 1831, was suspended only by Sir *H. Parker's* suit in 1832, and is to be considered as one continuous transaction until its completion in 1837; and that the notice, which, in March, 1832, was given to *Farrer & Co.*, on behalf of the Plaintiffs, will affect both *Benett* and *Marjoribanks*. The Defendants insist, that the treaty and contract for purchase with Miss *Dillon*, after Sir *J. J. Dillon's* death, was altogether a new transaction, unconnected with the treaty in the lifetime of Sir *J. J. Dillon*,—and that notice to a solicitor in one transaction is not notice to his client in a new transaction.

The general propositions,—first, that notice to the solicitor is notice to the client; secondly, that, where a purchaser employs the same solicitor as the vendor, he is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed; and, thirdly, that the notice to the solicitor, which [*408] alone will bind the client, must be notice in that transaction in which the client employs him,—have not, as general propositions, been disputed at the bar; but with respect to the last proposition, it was argued, for the Plaintiffs, that, where one out of two matters transacted by the same solicitor follows so close upon the other, that the earlier transaction cannot have been out of the mind of the solicitor when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction only, and that he will be affected with notice of both; and for this reference was made to *Winter v. Lord Anson* (a), *Mountford v. Scott*

(a) *Supra*, p. 399.

(b) 3 Russ. 486.

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(a), and *Hargreaves v. Rothwell* (b), to which I may add the case of *Brotherton v. Hatt* (c).

According to the Plaintiffs' argument upon this part of the case, carried to its full extent, the question is one of memory only on the part of the solicitor, irrespective of the circumstance which has entered into all the cases cited for the Plaintiffs,—that the same solicitor was employed by both parties,—the vendor and the purchaser. According to the Defendants' argument, the knowledge which the solicitor has must be acquired after and during the retainer, or it will not affect the client. I am certainly not prepared to accede to either proposition to the full extent. Cases may easily be suggested in which it would be impossible that a solicitor should have forgotten a fact recently under his view, with notice of which, however, it would be impossible to affect his client, unless the circumstance of his being solicitor for two parties be introduced into the case. And it is equally clear, where that circumstance forms part of the

case, that a purchaser may be affected with notice of
 [*404] *what the solicitor knew as solicitor for the vendor, although, as solicitor for the vendor, he may have acquired his knowledge before he was retained by the purchaser. Whatever the solicitor, during the time of his retainer, knows as solicitor for either party, may possibly in some cases affect both, without reference to the time when his knowledge was first acquired. If, therefore, in order to decide the cause now before me, it were strictly necessary that I should decide, as an abstract question, that a purchaser, who for the first time employs a solicitor (not being also the solicitor of the vendor), can be affected with constructive notice of anything known to the solicitor, save that of which the solicitor acquires notice after his retainer, and during his employment by the purchaser,—I should certainly feel great difficulty in coming to the conclusion. The rule, that notice to the solicitor will not bind the client, unless it be in the same transaction, or at least during the time of the solicitor's employment in that transaction, I have always understood to be a rule *positivi juris*, adopted by courts of justice in

(a) T. & R. 274.

(b) 1 Keen, 154. See also 3 Sug. Vend. 456, 10th ed.

(c) 2 Vern. 574.

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favour of innocent purchasers; and the reason and policy of the rule appear to me to shew that such is the case. "It is settled," says Lord *Hardwicke*, "that notice to the agent or counsel, who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards. It would be very mischievous if it was so; for the man of most practice and greatest eminence would then be the most dangerous to employ (a)." The expression commonly used in explaining the rule, namely, that the agent may have forgotten the former transaction, points at the same conclusion; and I cannot think that Lord *Eldon*, in the language he used extrajudicially in *Mountford v. Scott*, intended to shake the "general doctrine which himself, as well as Lord *Hardwicke* and other Judges, had so often insisted upon; *Warrick v. Warrick* (b), *Steed v. Whitaker* (c), *Hiern v. Mill* (d), *Mountford v. Scott* (e), *Kennedy v. Green* (g). It is not necessary so to understand Lord *Eldon's* language when construed with reference to the circumstances of the case before him. The rule limited as above, is, I presume to say, best adapted to, and fully sufficient for, the purposes of justice. [*405]

It appears to me, however, that it may not be necessary that I should give an opinion upon the abstract question. The cases of *Brotherton v. Hatt*, *Winter v. Lord Anson*, *Mountford v. Scott*, and *Hargreaves v. Rothwell*, do not appear to me necessarily to impeach the rule. The circumstances of these cases were, for the present purpose, in substance the same. The mortgagors had at different times employed the *same* solicitor in effecting different incumbrances upon the same estate; and the incumbrancers, with whom the contest arose, had employed the mortgagor's solicitor in the several transactions in which they were respectively concerned. The Court held the puisne incumbrancer affected with constructive

(a) 3 Atk. 392. 2 Id. 242.

(b) 3 Atk. 294.

(c) Barnard. Chan. Rep. 220.

(d) 13 Ves. 120.

(e) 3 Madd. 24.

(g) 3 Myl. & K. 699, approving *Mountford v. Scott*, and *Hiern v. Mill*, p. 720. See also the cases cited 3 Sugd. Vend. & Pur. 456, n. (u), with the reference to *Winter v. Lord Anson*.

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notice of the prior incumbrances ; for having, in that case, employed the mortgagor's solicitor, he would necessarily be affected with notice of the prior transaction, unless it should be held that the common solicitor (in his character of solicitor to the mortgagor) was not to be considered as recollecting the old transactions when engaged in the new. If that were admitted—if the notice which [*406] the solicitor of the mortgagor "had in the old transaction were not continued in the new transaction,—I do not know what should prevent the solicitor of the mortgagor from himself becoming an incumbrancer upon the estate, and insisting upon his incumbrance against the mortgagees, whose mortgages he had himself on former occasions prepared : this was in fact unsuccessfully attempted in the late case of *Perkins v. Bradley*(a). In the absence of special circumstances to affect the conclusion, and in the absence certainly of any rule of law affecting the case, it might be right to hold that the solicitor for the mortgagor had (like the mortgagor himself) notice of the prior transaction, in that very transaction in which he was employed by the mortgagees. It was one continuous dealing with the same title. If, as solicitor for the mortgagor, he had such notice in the new transaction as solicitor for both. The reasoning is technical ; and, in a case like that I am supposing, the technicality as well as the common sense of the case appears to me to be in favour of the decisions I am now considering. But, however that may be, the decisions must govern the present case, whether my attempt to reconcile them with the positive rule I have referred to be right or not.

In the case now before me, I consider it to be immaterial whether the treaty between Sir *J. J. Dillon* and Mr. *Benett*, and that between Mr. *Benett* and Miss *Dillon*, after Sir *J. J. Dillon's* death, were the same or not,—whether the latter was a continuance of the first or a new treaty,—Messrs. *Farrer & Co.* were the solicitors of the Defendant *Benett* from the commencement of the treaty in 1831 to its close. The notices of the Plaintiffs' interest were given to them in March, 1832, as the solicitors of *Benett*. Those notices were

(a) 1 Hare, 219.

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retained and preserved by them; and in this suit they come out of their possession from the answer of their [*407] clients. Upon the intermediate circumstances, and Mr. *Parkinson's* evidence, I have already observed, I cannot discover any ground upon which Mr. *Bennett* can escape from the consequences of the notice.

If Mr. *Bennett* is bound by the notice, Mr. *Majoribanks* must be bound by it also, not because abstractedly he is to be bound by facts which came to the knowledge of his solicitor in other transactions, but because the solicitor he employed in the business of the mortgage had notice of the Plaintiffs' interest, as the solicitor of the mortgagor, in the very transaction in which he (the mortgagee) so employed him.

THIS Court doth declare, that, under the agreement of the 18th of November, 1831, the Plaintiff, *R. Fuller*, as survivor of the Plaintiff *R. F.*, since deceased, is entitled to a lien on the undivided moiety of the manor, &c, mentioned and comprised in the agreement of the 15th of November, 1831, for such principal sum, not exceeding 2000*l.*, as, on the 18th day of November, 1831, was due from *Sir J. J. Dillon*, deceased, to *P. M. Chitty*, on the &c., together with interest thereon at 5 per cent. per annum, as a security for the amount due to the said *R. Fuller*, as such survivor, for principal and interest under and by virtue of the said indenture of the 1st of March, 1832; and the Defendants (*the assignees of Chitty*) admitting that the amount due to the Plaintiff exceeds what will be found due for principal and interest on taking the account hereinafter directed. This Court doth order and decree, that it be referred to the Master in &c. to take an account of what is due for principal, not exceeding 2000*l.*, and interest thereon, on the security of the said agreement of the 18th of November, 1831, and, for that purpose, the said Master is to ascertain what was the balance or sum of money due and owing from the said *Sir J. J. Dillon* to the said *P. M. Chitty*, in respect of the dealings and transactions in the pleadings mentioned, &c., at the time and date of signing the said agreement of the 18th of November, 1831. And the said master is to compute interest on such balance or sum, in case the same shall not exceed 2000*l.*; but, if the same shall exceed 2000*l.*, then on the sum of 2000*l.*, part thereof, at the rate of 5 per cent. per annum, from the 18th day of November, 1831. And for the better, &c. All just allowances. Reserves further directions and costs.

Reg. Lib. 1842. A. fo. 231.

 1843.—*Bower v. Cooper.*

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• BOWER v. COOPER.

1842 : 22, 26 & 27th April, and 3rd May.—1843 : 27th January, & 16th March.

An agreement to sell land, not expressing what interest in it,—is construed to mean the whole of the interest of the vendor in the land.

An agreement to purchase land for an annuity for life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity. The Court may not perhaps enforce the specific performance of a contract for the sale of an estate, where the consideration is uncertain (as a life annuity), if such consideration be greatly inadequate; but a difference of seven or eight per cent. is not such inadequacy.

Separation of the costs occasioned by a defence, founded on a statement of fact, disproved by the evidence.

THE bill was brought for the specific performance of the following agreement:—"Memorandum of an agreement made this 22nd day of January, 1841, between *Reuben Cooper*, of *Hinton*, of the one part, and *Charles Bower*, of *High Cliff*, both in the parish of *Christchurch*, in the county of *Southampton*, of the other part. The said *R. Cooper* hereby agrees to sell to the said *Charles Bower* the following:—A certain cottage and land recently purchased by the said *R. Cooper* of *J. Lane*; two cottages and land purchased of *W. Lane*; both in the parish of *Christchurch*,—the cottage and garden purchased by the said *R. Cooper* of *T. Burt*, in the parish of *Milton*, in the said county, which premises were lately in the respective occupations of *J. Davy*, the said *R. Cooper*. *T. Cratchley*, and *W. Church*, and one of the said cottages purchased of *W. Lane*, being now or lately void,—together with the crop in the ground thereof, for an annuity of 30*l.*, payable during the life of the said *R. Cooper*; and the said *C. Bower* hereby agrees to purchase the said premises for the annuity: and it is hereby agreed that the said annuity shall be charged on the said premises by an instrument giving the said *R. Cooper* power, upon non-payment of the same, to sell such premises for the purpose of raising the arrears thereof; and it is further agreed that the said annuity shall be payable quarterly from the 5th day of January, and that the first

 1843.—*Bower v. Cooper*.

payment thereof shall be made in advance, and that the said *C. Bower* shall be entitled to the possession and rents and profits of the same premises from the said "5th day of [409*] January, and that all expenses incurred in or about the said sale shall be borne by the said *C. Bower*, and that the deeds of the said premises shall be deposited with *M. Drutt of Christchurch*, solicitor, on behalf of both parties.—(Signed) *Reuben Cooper, Charles Bower*." The first quarterly payment of the annuity was made in advance on the execution of agreement.

The performance was resisted on four grounds,—First, on the allegation, that the Defendant was in a state of intoxication at the time of making and executing the agreement, and that the Plaintiff took advantage of his incapacity: *Coles v. Trecothick* (a), *Lightfoot v. Heron* (b), *Story, Com. Equity Jurisp.* p. 194, ss. 232, 233. Secondly, that the agreement was uncertain, inasmuch as it did not express what interest in the premises it was intended should pass to the Plaintiff: *Western v. Russell* (c). Thirdly, that, by the agreement, no provision was made for any covenant or security to be given for the payment of the annuity to the Defendant beyond the security of the premises; and that a court of equity would not enforce an agreement involving such an inequality and hardship: *Remington v. Deverall* (d). And, lastly, that the consideration for the purchase, assuming the subject to be the fee-simple of the premises, was inadequate, which, with respect to a contract founded on a consideration necessarily uncertain in its amount, was a ground for refusing specific performance: 1 *Sug. Vend. & Pur.*, p. 440, 10th ed., citing *Pope v. Roots* (e), *Mortimer v. Capper* (f), and *Jackson v. Lever* (g).

*Mr *Sharpe* and Mr. *Lewin* for the Plaintiff; and [*410] Mr. *Anderdon* and Mr. *James*, for the Defendant.

THE VICE-CHANCELLOR held, that the agreement must be con-

(a) 9 Ves. 234.

(c) 3 V. & B. 187.

(e) 1 Bro. P. C. 370, Tom. ed.

(g) 3 Bro. C. C. 605.

(b) 3 Y. & Coll. 586.

(d) 2 Anstr. 550.

(f) 1 Bro. C. C. 154.

 1848.—*Bower v. Cooper*.

strued as referring to and importing the whole of the Defendant's interest in the premises;—that, under the agreement, the Defendant was entitled, not only that the annuity should stand as a charge upon the premises, but also to the personal covenant of the Plaintiff for its payment; and that the Defendant had failed in proving any incapacity on his part to enter into the contract: none of the first three grounds relied upon by the Defendant, therefore, constituted any defence; and the Plaintiff must be declared to be entitled to the costs occasioned by the defence, founded on the alleged incapacity, which had failed; *Wright v. Howard* (a), *Deggs v. Colebrooke* (b), *Watts v. Manning* (c), *Mounsey v. Burnham* (d); although the separation of the costs was not to be adopted in practice upon light grounds, nor unless the respective costs applied to distinct cases, and were considerable, with reference to the whole evidence given in the cause.

On the fourth ground,—the inadequacy of the price,—after adverting to the effect which the Court formerly gave to evidence of inadequacy of price in contracts generally, independently of uncertainty of consideration; *Underwood v. Hitchcox* (e), *Day v. Newman* (f), *Young v. Clark* (g); and also adverting to the [*411] fact, that, in all the cases cited as authorities with reference to the inadequacy of the amount of a life annuity as a consideration, the life had dropped before the bill was filed,—and that all these cases had been decided before the modern rule, of treating inadequacy of price in contracts for the purchase of interests in possession as nothing more than an ingredient in evidence, was perfectly established, *Lowther v. Lowther* (h);—the Vice-Chancellor said that there did not appear, upon the evidence, to be in fact any inadequacy of price; but if the Defendant required it, he would direct a reference on that question. *Parken v. Whitby* (i), *Mortimer v. Capper*.

(a) 1 Sim. & St. 205.

(c) 1 Sim. & St. 421.

(e) 1 Ves. 272.

(g) Proc. in Cha. 528.

(i) 13 Ves. 108.

(b) 1 Atk. 396.

(d) 1 Hare, 22.

(f) 2 Cox, 77.

(h) T. & R. 366.

1843.—*Bower v. Cooper.*

THIS Court doth order and decree, that it be referred to the Master to inquire and state to the Court what was the value to sell of the property in the contract, dated the 22nd day of January, 1841, in the &c., and therein described as &c., at the date of the said contract, and what was the value of an annuity of 30*l.* per annum on the life of a party of the age of the Defendant at the same time, and for the better &c. And this Court doth declare, that the Plaintiff is entitled to so much of the costs of this suit as were occasioned by the defence set up by the said Defendant, that he was intoxicated at the time of making the said contract. Reserve the consideration of all farther directions, and of the payment of the costs above mentioned, and all the other costs of this suit. Liberty to apply.

The Master found that the value to sell of the premises and crop, at the date of the contract, was 302*l.* 10*s.*; and that the value at the same time of an annuity of 30*l.* per annum, on the life of a party of the age of the Defendant, was 278*l.* 18*s.* 2*d.*

Decree for specific performance, with costs.

1843: March 16th.

A party is entitled to a writ of assistance, under the 13th Order of August, 1841, to enforce obedience to a decree, although the memorandum, in the form prescribed by the 12th Order of August, 1841, endorsed upon the copy of the decree served, intimated that the party neglecting to obey it would be liable to process by attachment, serjeant-at-arms, or sequestration.

“Mr. *Lewin* moved, under Order XIII, of August, [*412] 1841, for a writ of assistance, upon an affidavit of service of a copy of the decree upon the Defendant, ordering him, within a fortnight, to deliver possession of the premises to the Plaintiff, and deliver up the title-deeds to *J. Drutt*,—and that a memorandum was endorsed on such copy, in the form prescribed by Order XII, of August, 1841 (a); and that such possession and delivery had been demanded and refused.

(a) “If you, the within-named A. B., neglect to obey this order [or, decree] by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same Court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order [or, decree].” See *Beavan's Ord. Can.*, p. 167.

 1843.—Gaunt v. Taylor.

The order had not been drawn up as of course, from a doubt which was entertained, whether, after serving the decree, accompanied with the form of memorandum given in Order XII, the Plaintiff had not elected to proceed by the remedies mentioned in that memorandum, and precluded himself from obtaining the writ of assistance, at least until the Court had made a previous order as a distinct foundation for it.

THE VICE CHANCELLOR ordered that the writ of assistance should issue.

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*GAUNT v. TAYLOR.

1843: 24th, 25th, and 28th Feb.

Administration of an estate, where a creditor had obtained judgment upon a plea of plene administravit by two of the executors, and a confession of assets to a certain amount by another executor,—such assets consisting of money in the hands of bankers not reached by the execution,—which the two executors prevented from being paid upon the cheque of the third executor to the judgment creditor, and which was afterwards paid into Court.

An executor, who, in an action at law by a creditor of the testator, has pleaded according to the truth of the case, is, when the assets are taken from him, and administered in equity, entitled to the protection of the Court against any personal liability in respect of such plea. †

Notwithstanding an order on further directions in a creditor's suit, that the costs of all parties should be taxed as between solicitor and client, and paid out of a fund in Court,—the fund proving insufficient to pay all the costs,—the Court ordered the costs of the executors to be paid in the first place.

J. TAYLOR, the testator, married *Hannah*, the widow of *R. Stringer*, and borrowed of *Waterhouse*, *Holt*, and *Cooper*, the executors of *Stringer*, the sum of 1,200*l.* *Taylor*, who was not a trader, died in January, 1830, indebted in that sum, and also indebted to other persons; and entitled to some real estate, subjected by his will to the payment of his debts, and to other real estate which did not pass by his will. He appointed *Hannah*, his widow,

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Tottie and *Shaw*, his executrix and executors. In June, 1830, *Waterhouse*, *Holt*, and *Cooper*, brought their action in the Common Pleas against the executrix and executors of *Taylor*, for recovery of the 1,200*l.* and interest; to which the executrix and executors of *Taylor* pleaded plene administravit. In the same month of June, the Plaintiff in his suit, a creditor of the testator *Taylor*, filed his bill on behalf of himself and the other unsatisfied creditors, for the administration of the estate. *Hannah Taylor*, the executrix, withdrew her plea of plene administravit to the action by the executors of *Stringer* (a), and instead thereof pleaded plene administravit præter the sum of 383*l.* 6*s.* 7*d.* (part of the testator's assets, which the executrix and executors had received and deposited in their joint names in the bank of Messrs. *Brown & Co.* at *Leeds*), and *goods and chattels of the value of 481*l.* [*414] 13*s.* 6*d.* (being the furniture and effects in the testator's house), making together 865*l.* 0*s.* 1*d.* *Waterhouse*, *Holt*, and *Cooper* then entered a nolle prosequi on the plea of the executors *Tottie* and *Shaw*, with payment of assets in futuro as against them; and an interlocutory judgment was signed against *Hannah Taylor*, the executrix, for the assets confessed, with an award of a writ of inquiry to assess the damages. The writ of inquiry was executed on the 2nd of November, 1830, and the damages (the debt and interest) were assessed at 1,249*l.* with 31*l.* 13*s.* costs, and final judgment was signed on the 11th of November, upon which execution issued to levy 865*l.* 0*s.* 1*d.*, part of the said damages and costs, of the goods and chattels of the testator, acknowledged by *Hannah Taylor* to be in her hands. Under this execution the sheriff seized and sold the furniture and effects, and paid the sum produced by the sale, amounting after deducting the expenses to 400*l.* 9*s.* 5*d.*, to *Waterhouse*, *Holt*, and *Cooper*, in part satisfaction of the judgment. *Waterhouse*, *Holt*, and *Cooper* applied to *Hannah Taylor* for payment of the 383*l.* 6*s.* 7*d.*, and she gave them a cheque on Messrs.

(a) The executrix also severed in her defence in this suit, having a different interest from her co-executors; and it was held to be a case in which two sets of costs should be allowed. See *Gaunt v. Taylor*, 2 Beav. 346.

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Brown & Co., dated the 15th of November, 1830, for 380*l.* The bankers, however, refused payment, alleging that they had received notice from *Shaw*, one of the executors, not to part with the money. Under an order of the 8th of February, the 383*l.* 6*s.* 7*d.* was paid into court, in the cause. The decree was made in June, 1831, and the usual accounts were directed. The Master, in taking the account of the debt due to the executors of *Stringer*, allowed interest on the principal sum of 1,200*l.* from the time of the assessment of damages until the time of the levy under the execution, and on the balance of such principal sum, after deducting the sum levied, from the time of the levy to the date of his report. Excep-
[*415] tions to the report in respect of such allowance of interest were taken and allowed (a); and the amount reported to be due was reduced to 880*l.* 3*s.* 7*d.*

In December, 1840, by an order made on further directions, and on the petition of *Waterhouse* and *Cooper*, (*Holt* being dead), it was ordered that,—there being a deficient fund for the payment of the creditors of the testator in full,—the Master should tax the costs of the Plaintiff as between solicitor and client, and any costs, charges, and expences he had incurred, not being costs in the cause,—and tax the costs of the Defendant *James Taylor* the heir-at-law,—and tax the costs of the Defendant *Hannah Taylor*, as between solicitor and client, and her costs, charges, and expenses, not being costs in the cause,—and tax the costs of the Defendants *Tottie* and *Shaw*, as between solicitor and client, and their costs, charges, and expences, not being costs in the cause. And, without prejudice to any question as to the ultimate appropriation thereof, an inquiry was directed of how much of 2732*l.* 6*s.* 11*d.* Consols, standing to the credit of the cause, was purchased with the 383*l.* 6*s.* 7*d.* paid into Court by the executrix and executors, and what interests had arisen therefrom; and so much of the fund as was so purchased and accumulated was ordered to be carried over to a “special account;” and an inquiry was also directed of how much of the

(a) See the report of *Gaunt v. Taylor*, 3 Myl. & K. 302, on the question of the right of the creditors in the Master's office to interest on the debt in respect of which they had recovered at law principal and interest.

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2782*l.* 6*s.* 11*d.* Consols arose from legal assets, of the testator, and so much as should be found to have arisen was ordered to be carried over to the same "special account." And the residue of consols was ordered to be applied in payment of the costs, and costs, charges, and expences before ordered *to be tax- [416] ed. And it was ordered that a case should be sent to the Common Pleas, for the opinion of the judges of that Court, on the following questions: first, whether it was necessary to docket the judgment recovered by *E. Holt*, *W. Waterhouse*, and *W. Cooper*, against the Defendants *Hannah Taylor*, *T. W. Tottie*, and *J. H. Shaw*, as executors of *J. Taylor* deceased, in order to give preference against the executors in the administration of the testator's estate, in pursuance of the 4th and 5th W. & M. cap. 20; and if the judges of the said Court should be of opinion that it was necessary to docket such judgment, then, secondly, whether such judgment was duly docketed.

In Michaelmas Term, 1841, the judges of the Common Pleas certified that it was not necessary that the judgment should have been docketed to give priority to the judgment creditor (a).

The Master, by his separate report, in April, 1842, found that a part of the fund, consisting of 497*l.* 12*s.* 8*d.* Consols, and 156*l.* 14*s.* 3*d.* interest thereon, was produced by the 383*l.* 6*s.* 7*d.*; and that 1312*l.* 15*s.* 2*d.* Consols, arose from legal assets of the testator. And by his general report, in July following, he certified that he had taxed the costs, charges, and expences of the Plaintiff at the sum of 1367*l.* 11*s.* 6*d.*—of *J. Taylor*, the heir-at-law, at 127*l.* 6*s.* 9*d.*,—of the executrix *Hannah Taylor*, (deducting sums due from her), at 97*l.* 13*s.* 6*d.*,—of the executors *Tottie* and *Shaw*, at 552*l.* 13*s.* 9*d.*; making in the whole 2,997*l.* 16*s.* 8*d.*

*At the time the cause came on for further directions, [*417] 1597*l.* 2*s.* 2*d.* Consols, and 45*l.* 12*s.* 10*d.* cash, were

(a) See the report of the argument before, and certificate of the judges of the Common Pleas,—*Gaunt v. Taylor*, 3 Scott, New R. 700, 712. And with reference to the same point, see 2 & 3 Vict. c. 11, s. 1; 1 & 2 Vict. c. 110, s. 19; 2 Wms. Executors, 804, ed. 2.

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standing to the "special account," and 1497*l.* 13*s.* 8*d.* Consols, and 111*l.* 1*s.* 1*d.* cash, to the credit of the cause generally. *Cooper*, who had survived *Waterhouse* and *Holt*, the other executors of *Stringer*, by his petition, prayed that the fund produced by the 383*l.* 6*s.* 7*d.* might be paid to him, in satisfaction of the judgment recovered against *Hannah Taylor*, upon her confession as to that sum.

Mr. *Anderdon* and Mr. *E. Montagu*, for the Plaintiff, contended, that he was entitled to be paid his costs out of the entire fund before specialty creditors, whether of the testator or of the executors; *Larkins v. Paxton* (a), *Barker v. Wardle* (b); and that this right was not affected by the proceedings which had taken place at law. The creditors, who had obtained judgment, had received all that the execution could give them; and the Court did not aid them further. If they had acquired any right personally against the executrix, in consequence of the form of her plea at law, that was a circumstance with which the Court would not interfere: *Kent v. Pickering* (c), *Burles v. Popplewell* (d). The Court was concluded by the order on further directions, in December, 1840, with regard to the application of the fund not carried to the special account, and was bound to distribute it in payment of the costs of all parties rateably: *Swale v. Milner* (e).

Mr. *Spence* and Mr. *Parker*, for the executors, *Tottis* [*418] and *Shaw*, argued, that the creditors, who recovered judgment, and obtained the cheque from the executrix, of which the executors had prevented the payment, did not thereby acquire any right to the money in the hands of the bankers as against the two executors and the general creditors; and that the costs of the executors must first be paid.

Mr. *Roupell* and Mr. *Elderton*, for *Hannah Taylor*, the executrix, contended, that she was justified in pleading as she had done,

(a) 2 Myl. & K. 320.

(b) 14. 518.

(c) 5 Sim. 569.

(d) 10 Sim. 383.

(e) 6 Sim. 572.

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and in endeavouring to pay the judgment creditor ; and that the costs of the executrix and executors were now the first charge.

Mr. *Kenyon Parker* and Mr. *Shee*, for the petitioner *Cooper*, contended, that the effect of the judgment, as now determined by the certificate from the Common Pleas, was to give the creditor a prior right to the monies which the executrix had confessed ; and that they were thereby taken out of the reach of the Court for the purposes of administration.

Mr. *Shebbeare*, for the heir-at-law.

VICE-CHANCELLOR, after stating the facts, and disposing of the costs of a motion in the cause, which had been a subject of discussion :—

With regard to the claim of the judgment creditor to the sum of 383*l.* 6*s.* 7*d.* in the banker's hands, it is now settled that money in the hands of a banker is not in the nature of a chattel deposited with a third party, but is merely a simple contract debt ; it is a mere debt owing to the executors : the judgment creditor had no means of reaching it at law, unless he acquired the power of doing so by means of the cheque, which he obtained from the executrix. The cheque was subject *to be countermanded before payment,—and it was in fact countermanded by the other two executors ; and the money was paid into Court. The payment into Court does not affect the right of any party : it is only secured for the party who shall be found entitled to it when all the facts are brought before the Court. Now, the case of *Lepard v. Vernon* (a), and other cases, shew that, although this Court does not deprive the creditor of any legal advantage which he has acquired, yet, if, without its assistance, he cannot obtain payment even out of legal assets, in priority to other creditors, the Court does not give him assistance to enable him to obtain that advantage.

In this case, I have to consider the effect of any order which I might make for the distribution of the produce of this particular

(a) 2 V. & B. 51.

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fund, either in payment of costs or otherwise, with reference to the position in which *Hannah Taglor* may be placed, in consequence of the proceedings at law. *Hannah Taylor*, by her plea at law, acknowledged the possession of this sum of 383*l.* 6*s.* 7*d.*; and, upon that confession, the judgment against her proceeded: the execution did not give the judgment creditor possession of the money, and the Court has since taken it out of the executors. What the personal liability of an executor may be, where he has pleaded a false plea at law,—or what degree of protection he may be in that case entitled to in this Court,—I am not now called upon to decide. That is not the present case. The plea of the executrix was in accordance with the truth of the case; and it is impossible I can

say, as an abstract proposition, that the executrix, who [*420] frames her plea at law according to the truth, has done wrong,—or that she is not entitled, in this Court, where the estate ultimately comes to be administered, to all the protection which the Court can give her against any consequences resulting from the interference of this Court and the nature of the plea at law. If the effect of the judgment was to charge the executrix to the extent of her acknowledgment, and immediately to give the creditor a right at law to recover these funds,—the executrix is entitled to be indemnified by means of such an application of the fund as will give the creditor the benefit of his legal right, and so protect her from any personal liability under which she might be placed by the judgment against her; I think the proper course in this case will be to retain this portion of the fund until the creditor shall have had an opportunity of taking such proceedings at law as he may think proper, in order to establish his title to it.

I have felt much difficulty in disposing of the question of costs in this case. The order made on further directions, in December, 1840, directed the costs, charges, and expenses, ordered to be taxed, to be paid out of the residue of the fund in Court, after carrying over part to the special account. In the case of *Swale v. Milner* (a), the Court considered itself to be bound by a similar order to

(a) 6 Sim. 572.

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apply the fund in payment of the costs rateably, where it proved to be insufficient to pay the whole of the costs in full, although the ordinary rule of the Court gave to some of parties a priority over the others in respect of costs. The order of payment which I directed in the case of *Tipping v. Power* (b), was merely following the old rule of the Court. And, if that is the order in which the parties are "entitled to the payment of their costs, and [*421] yet the Court is to be bound to apply the fund rateably, in consequence of the language of the prior direction, it follows that an effect is given to that direction which I cannot consider the Court to have intended,—for it involves a disposition of the fund (being deficient to pay all) which is not in accordance with the rights of the parties. Does the order which has been made force upon me the conclusion come to in *Swale v. Milner*? I cannot say that I think the language of the order so stringent as that case supposes. If a fund were ordered to be paid to creditors, and some were creditors by specialty, and others by simple contract, and the fund proved to be sufficient to pay them all, I cannot think the Court would be bound to interpret an order, the language of which is plainly flexible, so as to contravene a well-established and undisputed rule of practice. I proceed upon the ground that the order merely amounts to a charge upon the fund in favour of the parties entitled, according to their admitted rights.

I think the proper course in this case is to carry the order of December, 1840, into effect, with those specific directions which the circumstances now appearing render necessary; and that the direction to apply the fund in payment of the costs must be executed by making that payment in the order in which the respective parties are entitled to their costs, according to the general rule of the Court. I do not in this respect vary the order on further directions,—I only give to it a specific interpretation consistent with the language in which it is expressed.

THIS Court doth order, that 998*l.* 4*s.* 1*d.*, Bank 3 per cent. Annuities, part of 1567*l.* 2*s.* 2*d.*, like annuities, standing in the name of the Accountant-General, &c., in

(b) 1 Hare, 412.

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trust in this cause, "the special account," together with 29*l.* 1*s.* 6*d.* cash, [*422] part of the sum of *45*l.* 12*s.* 10*d.* cash in the bank to the credit of this cause, the like account (the said sum of 29*l.* 1*s.* 6*d.* being the proportionate part of the dividends accrued due on the said 1567*l.* 2*s.* 2*d.*, Bank Annuities, since the same were carried over to the said special account), be carried over in the name &c., in trust in this cause. And it is ordered, that the dividends hereafter to accrue due on 568*l.* 18*s.* 1*d.*, like annuities, residue of the said 1567*l.* 2*s.* 2*d.*, like annuities, after such carrying over as aforesaid, be as the same &c., laid out in the name &c., in the purchase of like annuities, in trust in this cause, the like account, and &c., subject to the further order of this Court. And this Court doth declare, that the same are to remain until the 28th day of February, 1844, to abide the result of any proceedings the petitioner *W. Cooper* may be advised to take, with a view to recover any claim which he may have against the Defendant *Hannah Taylor* personally upon or by virtue of the judgment in the petition mentioned. And it is ordered, that the Defendant *Hannah Taylor* do give notice to the Plaintiff of all such proceedings. And it is ordered, that the Plaintiff be at liberty to attend the same and take copies thereof at his own expense. Costs of all parties, of the petition of *W. Cooper*, and also of his former petition not already disposed of by the order made thereon, reserved. Liberty to apply on the said petition, and also with respect to the said 568*l.* 18*s.* 1*d.*, like annuities, and the accumulations thereon. Continue so much of the order of the 5th of December, 1840, as directs the said Defendants *Hannah Taylor*, *T. W. Tottie*, and *J. H. Shaw*, to apply for a return of the probate duty, and as directs the amount to be received, when the same shall be returned, to be paid into the bank &c. And, notwithstanding the said order in this cause of the 5th December, 1840, and the Defendant *James Taylor*, the heir-at-law, waiving any right of priority he may have as to payment of his costs out of any of the funds in this cause arising from descended estates in favour of the Defendants, the executors, it is ordered, that the 1497*l.* 13*s.* 8*d.* Bank 8 per cent. Annuities, standing, &c., in trust in this cause, and also the said 998*l.* 4*s.* 1*d.*, like annuities, when carried over, in trust in this cause as aforesaid, be sold with &c.; and out of the money to arise by the said sale when so paid in as aforesaid, and out of the sum of 111*l.* 1*s.* 1*d.* in &c., together with any other cash, &c., to the credit of this cause, at the time of the payment thereby directed, it is ordered, that the sum of 552*l.* 13*s.* 9*d.*, the balance of the costs of the Defendants *T. W. Tottie* and *J. H. Shaw*, two of the executors of the said testator already taxed, be paid to &c.; and thereout also, it is ordered, that the sum of 971*l.* 13*s.* 6*d.* the amount of the bill of costs of the said Defendant *Hannah Taylor*, the executrix, already taxed, be paid to &c. And it is ordered that it be referred to the taxing Master of this Court [*423] to tax all parties their costs of this suit, from the foot of the last taxation thereof, as between solicitor and client, except the costs of the defendant *James Taylor*, the heir-at-law, which are to be taxed as between party and party. [And it is here ordered, that the said taxing Master do look into the bill of costs of the Plaintiff already taxed, and ascertain what was the amount of the Plaintiff's costs mentioned and referred to in and by the said order and motion made in this cause, dated the 2nd day of June, 1831. And it is ordered, that the said Master in taxing the subsequent costs of the defendant *Hannah Taylor*, the executrix, do deduct the amount of the Plaintiff's costs mentioned and referred to in and by the said order, da-

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ted the 2nd of June, 1831, as aforesaid, and certify the total amount after such deduction]. And out of the residue of the monies to arise by the aforesaid sales and the aforesaid cash, after paying thereout the costs hereinbefore directed (the amount of such residue, if required, to be verified by affidavit), in the first place, it is ordered, that what the said Master shall certify to be the amount of the subsequent costs of the said Defendant *Hannah Taylor*, the executrix, after deducting the Plaintiff's costs mentioned and referred to in and by the said order on motion of the 2nd day of June, 1831, and also the subsequent costs of the Defendants *T. W. Tollie* and *J. H. Shaw* be paid; and thereout also in the next place, it is ordered, that the sum of 112*l.* 16*s.* 3*d.*, the amount of the costs of the Defendant *James Taylor*, the heir-at-law of the said testator, already taxed, and what the said Master shall certify to be the further costs of the said Defendant *James Taylor*, be paid; and thereout in the next place, it is ordered, that the sum of 1367*l.* 11*s.* 6*d.*, the amount of the plaintiff's costs already taxed, and what the said Master shall certify to be the further costs of the Plaintiff, be paid; and if the said monies and cash shall not be sufficient, after paying thereout the other costs as aforesaid, to pay the whole of the said costs of the Plaintiff, it is ordered, that the same be paid so far as the said monies and cash will extend. [Payment to be made to their respective solicitors.] And it appearing, and being admitted, that the funds applicable in this cause will be insufficient to make the payments hereinbefore directed, this Court doth not think fit to make any further order; but any parties are to be at liberty to apply to this Court as there shall be occasion.

*SUISSE v LORD LOWTHER.

[*424]

1843: 21st, 22nd, and 25th February.—11th and 14th March.

Several bequests to a servant of the testator, made in eight different instruments, held to be all cumulative, notwithstanding the gift to the party by the last codicil was much larger than any of the preceding gifts to him; and the whole amount given by that codicil was expressed as being given to *provide* for the servants of the testator. Where a testator makes several gifts to a stranger by different instruments, the presumption is, that such gifts are cumulative, and the circumstance of differences in their character or amount, or of a further motive or reason assigned upon the instrument, tends to strengthen the presumption [1]

Circumstances in which one testamentary instrument is held to be in substitution for or mere repetition of, another.

It is no objection to the hearing of a suit for a pecuniary legacy in which assets are admitted, that a decree for the administration of the estate of the testator has,

[1] See *Lee v. Pain*, 4 Hare, 217; *Russell v. Dickson*, 2 Dru. & Warren, 133. See *Yockney v. Hansard*, 3 Hare, 620, in reference to distinct gifts of different amounts given in the same instrument, whether in such cases the same are cumulative or not.

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been made at the suit of a residuary legatee; but whether the Court would direct the accounts of the same estate to be taken in both suits—*quære*.

THE Plaintiff entered the service of the late *Marquis of Hertford* (then Lord *Yarmouth*) in 1822, and continued in such service until the death of the *Marquis*, in 1842. The bill sought a decree against the executors for payment of various legacies, amounting in the whole to 19,500*l.*, under the will, and numerous codicils made by the *Marquis*, dated respectively in 1823, 1827, 1829, 1833, 1835, 1837, and 1839. The executors admitted assets. The question was, whether some of these legacies expressed to be given to the Plaintiff were not merely in substitution for others which had been made in the previous instruments, or whether they were all cumulative.

The several parts of the will and codicils material to the question are successively stated in the judgment.

A suit had been instituted by the residuary legatee against the executors for the administration of the testator's estate; and, in that suit, a decree for administration had been made before the institution of this suit, of which decree the Plaintiff in this suit had notice.

At the hearing,

Mr. *Roupell*, for the Plaintiff.

[*425] *Sir *C. Wetherell*, and Mr. *Follett*, for the executors, objected to the proceeding with this suit, on the ground that the decree already pronounced, in the suit of the residuary legatee, was in the nature of a judgment, even for all creditors; *Paxton v. Douglas* (a); and, if the proceedings of a creditor in another suit would be stayed, certainly legatees would not be permitted unnecessarily to multiply suits: *Jackson v. Leaf* (b), *Clarke v. Earl of Ormonde* (c), *Beauchamp v. Marquis of Huntley* (d).

Mr. *Roupell*, Mr. *Goodeve*, and Mr. *De Gex*, said that the objection, even if valid, was too late,—that it should have been made

(a) 8 Ves. 521.

(c) Jac. 108.

(b) 1 J. & W. 229.

(d) Id. 548.

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by motion before answer;—that the rule as to staying divers proceedings had never been applied to suits by legatees;—that, by the admission of assets, the Plaintiff had acquired in this suit a personal remedy against the executors, and that this suit was, therefore, more beneficial to him than the other suit would be,—which was a sufficient reason for not staying the second proceeding in any case; *Pickford v. Hunter* (a). Even where a creditor was proceeding at law, he was allowed to go on so far as related to his personal remedies against the executors; *Kent v. Pickering* (b).

THE VICE-CHANCELLOR said the question before him in this suit was very distinct from the subject of the other suit. In this suit, there was no account to be directed of assets (c), the Court was simply called upon to determine the right of the Plaintiff to the legacies "which he claimed upon the construction [*426] of documents, and either to decree payment as the executors, or dismiss the bill, according as the right should happen to be established or should fail: *Budgen v. Sage* (d). The cause must proceed.

Mr. Roupell, Mr. Goodeve, and Mr. De Gez, were then heard, for the Plaintiff, on the question of construction,—and Sir C. Wetherell and Mr. Follett, for the Defendant.

In addition to the cases mentioned in the judgment, the following cases were cited:—*Ridges v. Morrison* (e), *Currie v. Pye* (g), *Wray v. Field* (h), *Mackenzie v. Mackenzie* (i), *Bartlett v. Gillard* (k), *Lord v. Sutcliffe* (l), *Fraser v. Byng* (m), *Watson v. Reed* (n), *Strong v. Ingram* (o), *Guy v. Sharpe* (p), *Attorney-General v.*

(a) 5 Sim. 129.

(b) Id. 569.

(c) Accounts of the same estate taken in two different suits: *Hughes v. Eades*, 1 Hare, 489.

(d) 3 Myl. & Cr. 683.

(e) 1 Bro. C. C. 389.

(g) 17 Ves. 462.

(h) 6 Madd. 300.

(i) 2 Russ. 262.

(k) 3 Russ. 149.

(l) 2 Sim. 273.

(m) 1 Russ. & Myl. 90.

(n) 5 Sim. 431.

(o) 6 Sim. 197.

(p) 1 Myl. & K. 589.

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George (a), Mackinnon v. Peach (b), Spire v. Smith (c), Robley v. Robley (d).

VICE-CHANCELLOR :—

The Plaintiff claims to be entitled to several legacies under the will and seven codicils made by Lord *Hertford*. Under six of these instruments, he claims as a legatee named; and, under the other two, as being one of a class to whom legacies are given. [*427] The question to which the argument was directed was, whether the legacy of 8,000*l.*, given by the Marquis to his executors by the last codicil, was to be in addition to, or in substitution for, the legacies given by the previous instruments; and, to determine this question, I must first consider the construction of the previous instruments to which the last is supposed to refer.

The first claim is under a gift to servants, in these words :—“ I give and bequeath to every servant, who shall be living in my service at the time of my death (except such of them as were living in my service as Lord *Yarmouth*), clear of legacy-duty, one whole year's wages; and to every servant that shall be living in my service at the time of my death, and was also living in my service as Lord *Yarmouth*, clear of legacy-duty, three whole years' wages (e).” The testator divides his servants into two classes, and apportion his bounty according to the time of their service. There is no question that *Suisse* will take under this gift, according to his description or character, whatever that may be.

The next gift is,—“ I give and bequeath all my servants three years' wages who have lived with me three years,—to others, one year's.” This is a gift to servants whose qualifications to take will differ materially from those under the first gift. And, further on, in the same codicil, the testator removes all necessity for resorting to any presumption; for, he adds, “ All bequests made by this codicil to be in addition to any bequests I may have previously made to

(a) 8 Sim. 138.

(c) 1 Beav. 419.

(e) Will, dated in February, 1823.

(b) 2 Keen, 525.

(d) 2 Beav. 55.

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these legatees; and I confirm all codicils to my will (the only one I have made since my father's death) wheresoever and whatsoever (a)." By express words therefore, as well as by the presumption of law to which I shall advert,—*Suisse* [*428] would be entitled to take both these legacies.

The next gift is this:—"I give to my valet, *Nicholas Suisse*, if he be living with me at the time of my death, 1000*l.*, over and above any other bequest (b)." Here is a legacy differing in substance from those which went before. They were to be measured by the wages and the time of service,—here it is a gift of a certain sum upon a condition, with an express declaration that it shall be additional. Upon that there can be no question.

The next instrument is in these words:—"This is a codicil to the will of me, *Francis Charles*, Marquis of *Hertford*,—one copy of which is at *Coutts's*,—the other at *Hopkinson's*: I give to *C. L. Strachan*, my ward, over and above any and every other bequest, 15,000*l.*: I give to *Nicholas Suisse* similarly 2,000*l.*: both legacies to be paid within three months of my death (c)." Even if there were nothing in these words importing that the legacy to the Plaintiff was to be additional, there is nothing to exclude the presumption, that, being of a different amount from the former legacies, and given by a different instrument, he would take both. But there is nothing to which the word "similarly" can be referred, except the words "over and above," annexed to the previous legacy given to *C. L. Strachan*. In this case, also, we find an express direction that the legacy shall be taken in addition to previous legacies.

There then comes the legacy of 3,000*l.*, upon which it is contended that a question of substitution first arises. It is in these words:—"This is a codicil;—I give these legacies in addition to what I have in most instances given to the [*429] same persons by other codicils and bequests, all of which I confirm, as well as the repealing codicils in some instances; but

(a) Third codicil, dated February, 1837.

(b) Eighth codicil, dated October, 1839.

(c) Fourteenth codicil, dated July, 1838.

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this the dates will regulate;—to the Right Hon. *J. W. Croker*, 7,000*l.* additional;—to [name struck through], for medical attendance on me, when I die, 3,000*l.*;—to *Nicholas Suisse*, my valet, 3,000*l.*” The codicil also contains legacies to several other persons (a). Now, it was argued, on the part of the estate, that the 3,000*l.* given by this codicil, following the other two codicils giving 1,000*l.* and 2,000*l.*, was, in point of fact, a mere repetition of the other two; and the argument was important for this reason,—that the last codicil giving 3,000*l.* is thereby made sufficient, in point of amount, to satisfy the preceding gifts. And if the 3,000*l.* is to be taken as a mere repetition of the 2,000*l.* and 1,000*l.*, then, it was said, the 3,000*l.* given to *Suisse* by the last codicil would exceed the amount of the legacies given to him by the prior instruments. If, on the other hand, the 3,000*l.* was to be taken as cumulative, then the 3,000*l.* given by the last codicil would not in amount be a satisfaction of the legacies previously given.

The argument against the cumulative character of the legacy given by the codicil I am now considering was founded, first, on the coincidence in amount between the two former legacies and latter; and, secondly, on the fact, that the other legacies, given to Mr. *Croker* and others in the same codicil, have the word “additional” appended to them, while in the legacy to *Suisse* that word is not used. Leaving out the introductory part of the codicil, the question would certainly arise, whether the effect of the word “additional”

annexed to some of the gifts, and omitted in that to the [*480] *Plaintiff, would be to leave his legacy as a substitution for prior gifts. The cases, however, have expressly decided the point,—that, where there is nothing but the circumstance of omitting such words, the Court does not consider it sufficient to control that which, *prima facie*, is the meaning of the bequest. Where the mere bounty of the testator is the only apparent motive for the bequest, and no other is expressed, the rule is, that the legatee shall take in addition. But I confess I do not understand how to give to the introductory words their plain meaning, unless I take

(a) Twenty-fourth codicil, dated September, 1835.

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the legacy to be expressly additional. I have no right to strike out the words, "I give these legacies in addition to what I have in most instances given to the same persons by other codicils," in their application to the Plaintiff's legacy. It can only be by first assuming that this legacy was not meant to be cumulative, that I can come to the conclusion, that those words were not meant to apply to it. I am of opinion, that the Plaintiff takes the 3000*l.* as a distinct legacy, and that he was, therefore, at the date of this codicil, a legatee to the extent of 6000*l.*,—a fact which materially alters the amount to which he was entitled before and at the time when the last codicil was made.

On the next codicil no question arises. It is in these words:—"I give, above all other legacies, to *Charlotte L. Strachan*, 11,000*l.*; to the Right Hon. *John W. Croker*, 9000*l.*; to *T. Tomkinson*, equally in addition, 1000*l.*; and to *Nicholas Suisse*, equally in addition, 2600*l.* (a)." The codicil which contains the next gift to the Plaintiff is equally unambiguous:—"Independent of, and in addition to, all the other legacies I have given to *Nicholas Suisse*, I leave him 2000*l.* for continued good service (b)." If the express words had not avoided the "necessity of all argument, [*481] the mere fact, that this gift is contained in a separate instrument, would of itself probably be sufficient; but the additional fact, that, at this date, the testator speaks of *Suisse's* "continued good services," would be reason, within the authority of decided cases, for holding that that also was an additional legacy. Down to this time, therefore, the Plaintiff is a legatee to an amount considerably above 10,000*l.* Then follows the codicil to which I before referred, and upon which the argument has been founded. It is in these words:—"This is a further codicil to the last will of me, *Francis Charles, Marquis of Hertford*, K. G.: "I give and bequeath 16,000*l.* to my executors, that they may provide for my servants as follows—first, half of the same to *Nicholas Suisse*, my head valet, an excellent man; then I desire that the remaining eight may be

(a) Twenty-seventh codicil, dated Milan, January, 1837.

(b) Twenty-ninth codicil, dated September, 1837.

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split into three parts,—one to *Charlemagne*, my cook, one to *Fiorini*, my courier, another to *Robert* (really *Thomas*) *Footte*: there will then remain a quarter and an eighth, which I desire may be divided at my executors' pleasure, attending first to *James*, my coachman's, claims, and next to those who have slept under my roof, and been abroad with me (a)."

Now, passing over the gift for the benefit of *Suisse* in the first part of this codicil, it is quite impossible that, as regards the legacies to the other servants, substitution can have been the object of the testator; for the servants, who took under the former legacies, were selected in a manner totally different: they took absolutely, provided they fell under a certain description. Here the legacies remained at the pleasure of the executors, and the persons indicated are those servants who have slept under the roof and [*432] been abroad with the testator. Many of the servants, entitled under the will and former codicils, might not fall within that description; and it is impossible I could deprive them, by the effect of this codicil, of the bounty previously given.

On questions of repetition or accumulation, most of the Judges have referred, as Lord *Eldon* did in the case of *Hemming v. Gurrey* (b), to the judgment in *Hooley v. Hatton* (c), as containing a sound exposition of the law upon the subject,—and, in the case of *Hurst v. Beach* (d), Sir *John Leach* drew his conclusion from the cases with great precision, and, as it appears to me, with great accuracy: he stated the rule to be, that, where legacies are given by different instruments, the presumption is, *prima facie*, that two legacies are intended. But, inasmuch as if a testator were by one instrument to give a particular ring, or horse, or specific chattel, and were, by another instrument, to give precisely the same thing, it would follow that the second must be a repetition,—so, if the bounty given by one instrument be, in terms, a repetition of that which has gone before, the Court has presumed that the second was intended to be repetition, and not accumulation. It is clearly decid-

(a) Thirty-fourth codicil, dated November; 1839.

(b) 2 Sim. & St. 311. 1 Bligh. N. S. 479; *S. C. nom. Heming v. Clutterbuck*.

(c) 1 Bro. C.C. 390, n.

(d) 5 Madd. 358.

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ed, however, that the mere fact that the amount is the same, is not such an identification of the second with the first as would prevent both from taking effect as cumulative; but if, in addition to the amounts being the same, the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the Court to believe that repetition, and not accumulation, was intended. Except in such cases, and the class of cases to which I am about to advert, the Court does not infer that repetition was the "object, unless it be so declared, or it is [*433] to be collected from the words of the will itself.

The presumption, in the case of several gifts by different instruments, being in favour of accumulation, it is clear that the claim of the Plaintiff in this case must be strengthened by any circumstances of difference between the two gifts,—whether it be found in the amount,—in the character in which it is given,—in the mode of enjoyment,—in the extent of the interest,—or in the motive for the bounty. All these considerations tend, in the judgment of the Court, to support the argument in favour of accumulation. Now, in the legacy to *Suisse* by the last codicil, there is a particular description of *Suisse*, which imports a motive of a later date than the former legacies; he is described as "an excellent man,"—and the amount being different, and less beneficial to *Suisse* than the amount of the previous gifts to him, this adds to the presumption already in his favour, that a distinct gift was intended; and the only question, therefore, is, whether there is any thing in the word "*provide*," as used in the last codicil, which should lead the Court to the construction that the legacy is not cumulative.

Much argument has been founded in this case upon the use of the word "*provide*." The technical sense of the word, it was said, should be taken by analogy from those cases in which, in gifts from a parent to a child, or from a person standing in loco parentis towards the legatee, the Court had laid great stress on it. The language of the Court in those cases is, that it "leans against double portions,"—a rule which, though sometimes called technical, Lord *Cottenham*, in *Pym v. Lockyer* (a), said, was founded on good

(a) 5 Myl. & Cr. 24, 46.

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[*484] sense, and could not be "disregarded without dis-appointing the intentions of donors. But, although the presumption is, that a parent does not give a child a double portion, it does not follow that every sum of money which a parent may give even to a child is intended as a portion. The Court has never added up small sums in order to shew, that, if the child claims those sums as well as the larger provision made for him by the parent, he would be taking a double portion. The question, whether the sums given are to be taken as part of the child's portion or not, has often arisen; and, if the word "portion" or "provision," or any similar word, is used in the second gift, the Court has said the use of that term shewed that the sum was given as a provision or "portion" for the child; and then it is sometimes regarded as a second portion, against which the Court presumes. According to Lord *Cottenham's* decision in *Pym v. Lockyer*, (for the first time deciding that point), it is taken to be a satisfaction pro tanto. The older cases rather incline to the proposition, that, if it were a portion, though less than the portion given by any former instrument, it was to be taken as satisfaction in toto. The reasoning, however, is, that the use of the word "portion" or "provision," or any similar word, shews that the testator meant to repeat his former gift,—and then the rule applies.

In the case of persons not being parent and child, but assumed to stand in loco parentis, the word "portion" or "provision" has been used for a different purpose. It has been used in order to shew that the party intended to place himself in that situation, and to establish a quasi parental character; and when that was done, the rule as to double portions has been applied. But, if there is a simple gift, and the donor has not acted towards the donee in a way to shew that he has assumed a particular character,—a

[*485] quasi parental situation,—"in that case it is nothing more than mere bounty to a stranger. I am not aware of any technical sense of the word "provision" upon which stress has been laid, except in the cases to which I have adverted. No question can arise on the effect of a gift in the nature of a portion, in any such sense, on these bequests of the *Marquis to Suisse*.

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In the doctrine with regard to double portions, some principles have, however, been laid down, which bear very strongly upon the case before me. The rule of presumption, as I before said, is against double portions as between parent and child; and the reason is this,—a parent makes a certain provision for his children by his will, if they attain twenty-one or marry, or require to be settled in life: he afterwards makes an advancement to a particular child. Looking to the ordinary dealings of mankind the Court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the Court acts upon it and gives effect to the presumption, that a double portion was not intended. If, on the other hand, there is no such relation, either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason within the knowledge of the Court for cutting off any thing which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the Court should assign any limit to that bounty, which is wholly arbitrary. The Court as between strangers, treats several gifts as, *prima facie*, cumulative. The consequence is, as Lord *Eldon* observed (a), that a natural child, who [436] is in law a stranger to the father, stands in a better situation than a legitimate child; for advancement in the case of the natural child is not, *prima facie*, an ademption. That principle will apply very strongly to this case; for there is no more reason why the *Marquis* should give *Suisse* 1000*l.* rather than 20,000*l.* The *Marquis* could only measure the reward to be given to *Suisse* for the fidelity alluded to in the will and codicils; and the Court can form no presumption on which to limit the amount of that reward. So far the cases stand very much *pari materia*.

The only argument to which the word “provide,” as used in the last codicil, can be open, is, whether the *Marquis* might not have

(a) 18 Ves. 147.

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[*484] sense, and could not be "disregarded" in appointing the intentions of donors. The presumption is, that a parent does not give a child, it does not follow that every sum of money which even to a child is intended as a portion. The ed up small sums in order to shew, that, if sums as well as the larger provision made would be taking a double portion. The given are to be taken as part of the child's arisen; and, if the word "portion" word, is used in the second gift, the term shewed that the sum was given for the child; and then it is sortedion, against which the Court *tenham's* decision in *Pym v.* that point), it is taken to be cases rather incline to the though less than the portion to be taken as satisfaction the use of the word "portion" shews that the testator the rule applies.

In the case of *papers*, I have ad-
 sumption against any
 of the instruments in
 facie, they are cumulative,
 the instruments are in substitu-
 one is to take effect, another is to
 The cases of the *Duke of St. Albans*
ing v. Gurry, and *Russell v. Dickson* (b)
 very clearly. In the *Duke of St. Albans v.*
 uments were almost repetitions one of the other.

[*485] which he had given by the first instrument,—such as
 jewels, and certain specific articles which were of neces-
 technic but repeated gifts of the same thing. In the case of
 laid, *ing v. Gurry*, also, the testator was in the habit of copying
 can will; and although there were some differences, yet the two
 suc' (a) 2 Atk. 636. (b) 2 Dru. & Warr. 133; S. C. 1 Con. & Law, 224.

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with regard to double portions, some principles laid down, which bear very strongly upon the rule of presumption, as I before said, is in favour of parent and child; and the reason is, that a provision for his children by his will, or require to be settled in his lifetime, or to a particular child, is a strong presumption, that the Court concludes that the testator intended to advance the child, and discharged at his death, the debt of general advancement, and the presumption is, that the child is to be satisfied in his life.

d in substance, very nearly a repetition of *Suisse v. Dickson*, the paper, which is construed as a final declaration of the will. But it is impossible for the will and the very large amount, very

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It is impossible in any sense of the word, to be satisfied by him for and his positions.

It strongly tends to convince me of the effect to the last codicil, as Plaintiff:—in pursuing the language of the various codicils, you find that, the property to persons who had naturally a claim, afterwards continually cutting down the property for those persons, and giving his property to *Suisse*, as well as gifts, to an enormous amount, to persons who had no natural claim upon him, I give no ground for conjecture. It is nothing but conjecture. I do not find any thing in this will to deprive *Suisse* of the whole amount which he claims. Decree for payment of the legacies, without costs.

March 11th.

Whether the execution of a decree for payment of a legacy to a party who is residing in a foreign country, will be stayed, pending an appeal against the decree, or whether security will be required from such party before payment pending an appeal—*quære*.

A motion was made to stay the execution of the decree pending the prosecution of an appeal to the *Lord Chancellor* by the Defendants against the above decree. The ground of the motion was, that

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meant it as a direction to the executors to pay *Suisse* that which he had given him by the preceding instruments;—as if he had said, “in order to enable them to give *Suisse* that provision which I have made for him.” But do those words necessarily import that the 8000*l.* was given in order to enable the executors to provide for *Suisse* by paying the amount of the former legacies? He is in the situation of a stranger to the testator; the gift is mere bounty; and, when that is so there is no ground for raising any presumption of intention as to its amount, whether the gift is comprised of one or several bequests. I have nothing by which to measure the intended bounty. Why am I to say that the *Marquis* did not consider, after the continued service of *Suisse*, that the provision he ought to have was 8000*l.* in addition to what he had previously given? the rule of law being, for the reasons I have stated, in favour of the last legacy being cumulative. I am clear I have no right to speculate on any *veiws the *Marquis* may have had, or to hold that the last codicil was merely intended to provide for the payment of the former gifts.

Looking at the case as it stands upon these testamentary papers, without reference to any of the considerations to which I have adverted,—taking it as clear that there is no presumption against any of the legacies, independently of the form of the instruments in which they are found,—and that *prima facie*, they are cumulative,—the question may still be, whether the instruments are in substitution one for another,—so that if one is to take effect, another is to be regarded as cancelled? The cases of the *Duke of St. Albans v. Beauclerk* (a), *Hemming v. Gurry*, and *Russell v. Dickson* (b) illustrate that subject very clearly. In the *Duke of St. Albans v. Beauclerk*, the instruments were almost repetitions one of the other. In several instances, the testator had given the identical thing by the second which he had given by the first instrument,—such as particular jewels, and certain specific articles which were of necessity nothing but repeated gifts of the same thing. In the case of *Hemming v. Gurry*, also, the testator was in the habit of copying his will; and although there were some differences, yet the two

(a) 2 Atk. 636.

(b) 2 Drn. & Warr. 133; *S. C.* 1 Con. & Law, 284.

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instruments were, to the eye and in substance, very nearly a repetition the one of the other. In *Russell v. Dickson*, the paper, which the testator called his last will, was construed as a final declaration of his will, excluding all that had gone before it. But it is impossible to apply that reasoning in this case; for the will and the several codicils dispose of property, to a very large amount, among a number of persons who are obviously very *marked and favoured objects of the testator's bounty, [*438] but of whom there is no mention in the last codicil, which touches nobody but *Suisse* and some particular servants. It is impossible, therefore, to treat the last instrument, in any sense of the word, as being the will of the Marquis substituted by him for and superseding all his former testamentary dispositions.

I may observe another fact, which strongly tends to convince me of the obligation I am under to give effect to the last codicil, as containing additional gifts to the Plaintiff:—in pursuing the language of the testator through the various codicils, you find that, having begun by giving his property to persons who had naturally a claim upon him, he is afterwards continually cutting down the provisions he had made for those persons, and giving his property to strangers. Why he should not have intended to make his liberal provision for *Suisse*, as well as gifts, to an enormous amount, to other persons who had no natural claim upon him, I give no ground for saying. It is nothing but conjecture. I do not find any thing in this will to deprive *Suisse* of the whole amount which he claims.

Decree for payment of the legacies, without costs.

March 11th.

Whether the execution of a decree for payment of a legacy to a party who is residing in a foreign country, will be stayed, pending an appeal against the decree, or whether security will be required from such party before payment pending an appeal—*quære*.

A motion was made to stay the execution of the decree pending the prosecution of an appeal to the *Lord Chancellor* by the Defendants against the above decree. The ground of the motion was, that

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the Plaintiff had gone to reside in *France*; and that, legacies were paid, and the judgment afterwards reversed, the Defendants [*429] would have no means of recovering the money, or would be dependent on the result of a suit for that purpose before a foreign jurisdiction. The motion was opposed; but no order was made upon it,—the *Lord Chancellor* having, under the circumstances, permitted the case to be immediately heard before him.

The following cases were cited in the argument on the application for the stay of proceedings:—*Huguenin v. Baseley* (a), *Gwynn v. Lethbridge* (b), *Way v. Foy* (c), *Wood v. Milner* (d), *Nerot v. Burnand* (e), *King of Spain v. Machado* (f), *Walburn v. Ingilby* (g), *King of Spain v. Machado* (h), *Storey v. Lord John George Lennox* (i). [1]

THE decree was affirmed by the *Lord Chancellor*, on the 29th of March, 1843.

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| (a) 15 Ves. 180, | (b) 14 Ves. 585. | (c) 18 Ves. 452. |
| (d) 1 J. & W. 636. | (e) 2 Russ. 56. | (f) 4 Russ. 560. |
| (g) 1 Myl. & K. 79. | (h) Id. 83, n. | (i) 1 Myl. & Cr. 685. |

[1] As to staying proceedings, pending an appeal, See *Garcias v. Ricardo*, 1 Phillips 493, and note 1, by American Editor, at page 500.

In the *Mayor &c. of Gloucester v. Wood*, 3 Hare, 150. After dismissal of a bill for a legacy, the plaintiff applied to stay the transfer out of court, pending an appeal from the decree of a sum of stock which stood to the credit of the cause, the court ordered that on the plaintiff's undertaking to submit to any order the court might thereafter make for the payment of interest or costs, the transfer of the fund should be stayed, with liberty for defendants to apply for such transfer, upon security to be given by them. The *Lord Chancellor* on appeal, 1 Phillips, 493, decided that the fund ought not to be parted with, until the appeal had been disposed of; but gave the defendant's liberty to apply for the payment of any part out of court to be invested upon the securities. He, however refused to require the plaintiffs to enter into any undertaking by way of indemnity against a possible fall in the funds. That taxation of costs under a decree, pending an appeal from the decree, will not be stayed. See *Finkett v. Wright*, 4 Hare 160.

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1843: 13th, 14th, 15th, 18th, 20th, 21st. and 22nd March, and 7th April.

Under the Statute 7 Geo. 4. c. 57, all persons who are creditors of an insolvent debtor, at the time his petition for discharge is filed in the Court for the Relief of Insolvent Debtors, are entitled, taking proper steps for that purpose, to participate in his estate, whether the same have or have not been inserted by the insolvent in his schedule.

The purchaser of the estate of an Insolvent Debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees, in conducting the sale,—such circumstances being entirely collateral to any question of title.

A sale of the estate of an Insolvent Debtor, made bona fide, at a public auction, is not, after conveyance to the purchaser, necessarily voidable in equity, only because the purchaser, after the sale but before the conveyance, had notice of circumstances attending the conduct of the sale by the assignees, amounting to negligence on their part.

THE Plaintiff was tenant for life, unimpeachable for waste, of a manor and farm named *Brigsley*, in *Lincolnshire*, subject to a term of years for raising 500*l.* apiece for such of the five children of *J. Borell* as should attain twenty-one, or, having been married, should die under that age.

The Plaintiff, in 1831, raised sums of 1,600*l.* and 200*l.* upon mortgage of his life interest in the *Brigsley* estate. In 1835, he effected an insurance on his life for the sum of 1,600*l.* with the Provident Institution, and assigned the policy to the mortgagees as a further security for the money due upon the mortgage.

In April, 1837, the Plaintiff was arrested for debt, and being in prison in the gaol of *Hull*, on the 30th of January, 1838, signed his petition to the Court for the Relief of Insolvent Debtors for his charge, under the Statute of the 7 Geo. 4 (a), and executed the usual conveyance and assignment of his real and personal estate to the provisional assignee. The Defendants *W. Dann* and *T. Kennington* were afterwards appointed assignees of the estate and effects of the Insolvent, which were thereupon conveyed and assigned to them.

(a) C. 57, s. 10.

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[*441.] *The assignees, having taken the preliminary steps required by the statute (a), advertised the sale of the Plaintiff's life interest in the *Brigsley* estate to take place at *Great Grimsby*, on the 8th of May, 1838, by auction. Shortly before the time of the intended sale, the Plaintiff caused notices to be posted in the neighbourhood, to the effect that he had applied to the Court of Insolvency to suspend the sale, and that any persons becoming the purchasers would do so at their peril. The assignees in consequence of this notice postponed the sale. On the 16th of May, the assignees having found that the application of the Plaintiff to the Court had been refused, applied for permission to proceed to a sale, without calling another meeting of the creditors, but the Court was of opinion that all the steps preliminary to a sale under the act should be again taken. This was accordingly done, and the sale was advertised for the 12th of July, 1838, on which day it took place, and the Defendant *George Babb*, solicitor, of *Great Grimsby*, being the highest bidder, became the purchaser of the Plaintiff's life interest in the *Brigsley* estate, at the sum of 940*l.*

On the 18th of August, an application of the Plaintiff to stay the assignees from proceeding with the sale of the Plaintiff's life estate was heard before the Court for the Relief of Insolvent Debtors, and was refused. The assignees conveyed the estate to *Babb*, the purchaser, by indentures dated the 31st of August and the 1st of September, 1838.

On the 13th of September, the Plaintiff filed his bill against the assignees and *Babb*, the purchaser, praying the declaration of the Court that the said alleged price agreed to be given by [*442] *Babb* for the Plaintiff's life estate *was grossly inadequate, and that the sale to *Babb* was fraudulent and void as against the Plaintiff, and that any conveyance of such life estate and any assignment of the said policy to *Babb* which might have been made or executed by the Defendants, the assignees, was and were respectively fraudulent and void, and ought to be set aside as against the Plaintiff; and that the life estate and policy might be

(a) Sect. 20.

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respectively decreed to be reconveyed and re-assured to the Plaintiff, or for his benefit, by the Defendants and all other necessary parties, subject to the said existing mortgage thereon created by the Plaintiff; the Plaintiff offering to pay to the Defendants or otherwise, as the Court might direct, the amount which might be necessary for payment of all the Plaintiff's debts under his insolvency, and all the costs and expenses, if any, remaining unpaid and necessarily and properly incurred by the Defendants, the assignees, in execution of their trust as such assignees; and that, if necessary, an account of such debts and costs might be taken. Or, if the said sale and conveyance should not be decreed to be altogether set aside, then that the conveyance might be rectified in respect of the parcels improperly comprised therein and otherwise in the particulars thereinbefore stated, and as might be requisite and proper; and that the Defendants might make due payment and satisfaction in respect of the said matters.

The Plaintiff rested his claim to relief upon the ground that the assignees, in their mode of conducting the sale, had been so negligent of their duty to the insolvent, and had acted so improvidently as respected his interests, and their conduct amounted to a breach of trust; and that the purchaser was affected with notice of such alleged breach of trust to an extent which vitiated the sale. Various circumstances were relied upon as supporting the charges. The sale was said to "have been wholly [*443] unnecessary, inasmuch as Mr. *Hughes*, a clerk of the Plaintiff's attorney, attended on the morning and at a place of sale, and tendered to the assignees the sum of 528*l.* 19*s.* 7*d.*, being the amount of the debts in the Plaintiff's schedule, and a further sum for expenses, making up in the whole 550*l.*, tendering also at the same time a deed for the execution of the assignees. It was alleged, moreover, that the description of the life estate offered for sale omitted several particulars which enhanced its value, namely, that the Plaintiff was tenant for life, unimpeachable of waste, and that he was entitled to the manorial rights, and to certain fee-farm or quit rents; and that the policy of insurance ought to have been, but it was not included in the property sold. Not only, it was said, was the sale

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conducted in a depreciating manner, by introducing a stipulation that the vendors should not be required to do more than shew the conveyance of the estate to themselves from the provisional assignee,—by not making known the condition of sale until the morning of sale,—and by reading in the sale-room a letter, which stated, that the life of the Plaintiff, from his intemperate habits, was not insurable; but that the estate was actually disparaged by misdescription: that the premium of 4*l.* 1*s.* 4*d.* per annum, in respect of the policy of insurance was stated to be a charge upon the land, which was not true; and that the estate was also described as subject to the tithes and land-tax, whereas the tithes and land-tax were both borne by the tenant, to whom it was let at a net rent of 650*l.* a year. It was contended that the result of the transaction was, that the estate was sold at a price grossly inadequate, and not amounting to more than one-and-a-half year's purchase.

The assignees, by their answer and at the bar, justified the sale of the estate, by insisting that the tender of the amount [*444] of the scheduled debts and expenses was not sufficient, as the amount of the debts was liable to be increased by the introduction of the claims of other creditors and by additional claims of the creditors whose names were already in the schedule: that Mr. *Acton*, solicitor, had proposed to *Hughes* that he should pay the amount of the scheduled debts, and give an undertaking to pay the deficiency and expenses; which however, *Hughes* declined; and that even if the tender had been sufficient in amount, the assignees were not bound therefore to stop the proceedings on the morning of sale, and immediately execute the deed which was tendered to them, the effect of which might require much consideration. They contended that there was no material omission in the particulars of sale: that the life estate was not enhanced in value by being unimpeachable for waste, inasmuch as there were no mines on the property, and the Plaintiff had previously caused all the timber of any value to be felled: that the alleged quit rents, at the utmost, amounted to 4*l.* or 5*l.* a year, and to this the title of the Plaintiff was disputed, and was by no means clear, and to have included them in the particulars of sale might have embarrassed the vendors in

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making a title to the property : and that the manorial rights were of no more than nominal value. They denied that the mode of conducting the sale had been calculated to depreciate the property, or that they acted otherwise than properly therein. They said that it was unimportant whether the policy of insurance, being a collateral security to the mortgagees, was sold or reserved ; and that although the statement that the premium was a charge on the estate was erroneous, yet as it was necessary to keep the policy on foot to secure the mortgage debt, and there being no other fund for that purpose, the effect was substantially the same as if it had constituted an actual charge. They insisted that no purchaser could have mistaken the meaning of the statement that the estate was subject to tithes and land-tax and that it was not untrue [445] merely because of the special stipulation made with the then existing tenant. Instead of the sale having been made at an inadequate price, the Defendants alleged that the purchase-money was nearly six and a half 'years' produce, after deducting the interest of the charges upon the corpus, as well as upon the life interest of the estate, from the best rent which could have been permanently expected ; and that owing to the intemperate habits of the Plaintiff, and, in consequence thereof, the uninsurable character of his life, the price was perfectly adequate, and in fact involved the purchaser in very considerable risk.

The purchaser, by his answer, denied notice of any breach of trust on the part of the assignees.

The evidence directed to the several points above stated was very voluminous. Many witnesses were examined on the subject of the alleged habitual intemperance of the Plaintiff, and the value of his life at the time of the sale. The conclusion to which the Court came, on the effect of the evidence, appears upon the judgment.

Mr. Bethell, Mr. Kenyon Parker, and Mr. Rogers, for the Plaintiff.

Mr. Tinney, Mr. Romilly, and Mr. Glasse, for the Defendants, the assignees.

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Mr. *Lowndes* and Mr. *Smith*, for the purchaser.

The argument consisted chiefly of comments on the various facts in evidence. The points of law discussed were,—First, whether the scheduled creditors were necessary parties to the suit. Secondly, whether the Court for Relief of Insolvent Debtors had [*446] exclusive jurisdiction *on the subject, at least so far as the conduct of the assignees was concerned; or whether this Court would set aside a sale which that Court had directed. Thirdly, whether the debts in the schedule at the time of the sale, and in respect of which the tender was made, were debts of the Insolvent, in respect of which the assignees were interested, or whether those debts were liable to be increased in amount by other claims against the Insolvent, in addition to those which he had inserted in his schedule.

The following cases were cited:—*Twining v. Morrice* (a), *Mortlock v. Buller* (b), *Shelly v. Nash* (c), *Fox v. Wright* (d), *Barton v. Tattersall* (e), *Barton v. Jayne* (g), *Kaye v. Fosbrooke* (h), *Lautour v. Holcombe* (i), *Tyers v. Stunt* (k), *Yewens v. Robinson* (l), *Earl of Aldborough v. Tyre* (m).

VICE-CHANCELLOR:—

At the close of the argument, I stated my opinion to be that the Plaintiff had reasonable cause to complain of the conduct of the assignees and their agents, as well as of his own agent, in respect of manner in which this part of his property had been dealt with,—reserving my judgment however upon the question, whether the acts he might so complain of against those parties were such as would vitiate the sale in a Court of Equity, as against a bona fide purchaser at a public auction, after conveyance executed to such purchaser. I, at the same time, observed, that if the Plaintiff was entitled to impeach *the transaction, he might stand before [*447] the Court in such a position that I could not grant him

(a) 2 Bro. C. C. 326.

(d) 6 Id. 111.

(h) 8 Sim. 38.

(l) 11 Sim. 105.

(b) 10 Ves 292.

(e) 1 R. & M. 237.

(i) 8 Sim. 76.

(m) 7 Cl. & Fin. 436.

(c) 3 Madd. 232.

(g) 7 Sim. 25.

(k) 7 Sedg. 349.

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relief, without inquiry into the question whether the sale was providently and properly made or not. I allude particularly to the very imperfect information which the Plaintiff has afforded me of the real history of the tender made by *Hughes*, on the 12th of July, 1838:—it being extremely doubtful upon the evidence, whether, according to the truth of the case, the Plaintiff is not complaining of the assignees for having refused to convey the estate to a purchaser with whom he had made a contract for 550*l.* or less, and having afterwards sold it to the Defendant *Babb* for a much larger sum. I am far from being satisfied, upon the evidence, that if the 550*l.* had been accepted by the assignees, the estate would have been thereby redeemed for the benefit of the Plaintiff. I should be very reluctant, however, to found my judgment upon a view of the case which excluded from consideration so many of the points which were argued at the bar.

The leading points relied upon for impeaching the sale were two,—first, the tender to which I have referred; and, secondly, the alleged negligent and improper manner of conducting the sale, amounting, as it was said, to a breach of trust in the assignees, with which, under the circumstances, the purchaser should be affected. I shall begin by considering the objections exclusive of the tender.

In considering this part of the case, it must be remembered that I am not called upon to give the purchaser the assistance of this Court in obtaining the completion of his contract. His contract was perfected by conveyance before the bill was filed, and his title has since received the accession of the legal estate by a transfer of the mortgage to which the life interest of the Plaintiff was subject at the time of the sale. It was said, indeed, that the completion of the contract was a hurried transaction, and that for the purpose of giving the purchaser the advantage I have just alluded to; and it would perhaps be difficult for the Defendants successively to contend that that observation was not, to some extent, well founded. But to what does the charge amount? If the circumstances of the case are such as to entitle the Plaintiff to avoid the transaction, on the grounds of fraud or breach of trust, the execution of the conveyance to the purchaser will not deprive the

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Plaintiff of that relief, and, if the circumstances of the case are not in other respects such as to entitle the Plaintiff to avoid the transaction, I cannot deprive the purchaser of the benefit of his contract only because he has used diligence in placing himself in the position most advantageous for maintaining his right. The utmost effect I can give to the precipitancy imputed to the purchaser is that of scrutinizing with the greater jealousy the other grounds which have been relied upon for impeaching the sale. And certainly I stand in no need of any such circumstance to induce me to scrutinize the fact of this case with the utmost jealousy. But still I must deal with the case as one in which I am called upon, not specifically to enforce a contract at the suit of a purchaser, but to rescind a sale perfected by conveyance. I may observe, that notice to a purchaser before conveyance, that a bill would be filed to impeach his purchase, is only notice that all valid objections would be taken to it. The question then is, how far Mr. *Babb's* interest, as a purchaser, is affected by the circumstances to which I now confine my attention?

The Bill charges the purchaser with notice of the various matters which were relied upon as evidencing negligence in the manner of selling by the assignees, and charges this to have been a [*449] breach of trust, in which Mr. *Babb*, having notice, was therefore implicated. Now, so far as this charge means that *Babb* had such notice before or at the time of the sale, I am bound to say I think the evidence does not support it. I think myself bound upon the evidence to declare, that I can discover nothing in the facts of this case which would justify me in saying that Mr. *Babb* did not retire from the auction room on the day of the sale unaffected by a single circumstance which could subject him to the charge of unfair dealing in the matter of the sale. But it was said that a careful examination of the title and quality of the estate he purchased would have led him, before conveyance and payment of his purchase-money, to a knowledge of those circumstances which are said to have constituted a breach of trust in the Plaintiff's assignees. This, it will be observed, is notice acquired after the sale; and it will be proper to consider whether such notice is actual or constructive. I shall, for this purpose, adopt the Plaintiff's argu-

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ment, that the purchaser must be taken to have investigated the title, and to be affected with constructive notice of all that investigation would have led to. But here an important distinction must be taken. The complaint in this branch of the case is,—not that the act of the assignees in selling was unlawful, (it is only in reference to the tender that the sale is complained of as unlawful),—but that the manner of effecting it was unlawful. Now the investigation of the title would not necessarily, or by any legal implication, lead to a knowledge of that. It was not the purpose for which the title was investigated: it is collateral to title. It depends upon circumstances—upon discretion,—perhaps, upon the conduct of the insolvent,—upon the interests of creditors, having regard to the life interest with which they had to deal,—upon the actual state of the title and property,—upon the documents of title which the assignees had or had not;—upon a hundred minute circumstances,—to a knowledge of which the most elaborate “investiga- [*450] tion of the title would not necessarily lead, and of which (not having actual notice) the purchaser was not bound to inquire. If I am to hold that a purchaser is under a positive obligation to inquire into a collateral question, such as the manner of selling, I shall in effect impose upon every purchaser from assignees, at a public auction, a fiduciary character as between him and the owner of the estate.

The only circumstance I can find which could possibly bring the purchaser within the range of the Plaintiff’s observations at the moment of the sale, is the alleged inadequacy of the consideration given for the estate. Mr. *Babb* may certainly have had local knowledge sufficient to inform him of the advantageous nature of the bargain he was making. But, with that exception, if he is to be affected at all, it must I think, be from knowledge actually acquired after his contract was made.

Now with respect to the adequacy of the consideration alone, considered apart from the alleged improvidence in the manner of selling, I certainly understand the rule of the Court to be that, even in ordinary cases (a), and a fortiori in cases of sales by public auction,

(a) See 1 Sugd. V. & P. 440., ed. 10.

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mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, *White v. Damon* (a), *Ex parte Latham* (b), and still less can it be a ground for rescinding an executed contract. The only exception which I believe can be stated is, where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case. The case must, [*451] however, be strong indeed, in which a court of justice shall say, that a purchaser at a public auction, between whom and the vendors there has been no previous communication affecting the fairness of the sale, is chargeable with fraud or imposition, only because his bidding did not greatly exceed the amount of the vendor's reserved bidding. I am perfectly satisfied that the Plaintiff's case cannot be sustained upon the ground of mere inadequacy. Another principle must be introduced. It must be made out that the assignees were guilty of a breach of trust in fixing so low a reserved bidding as 900l.; and (as I have already observed) that the purchaser was bound to have ascertained that a breach of trust had not been committed in that respect before he accepted the conveyance. It is unnecessary upon this part of the case to do more than refer to the evidence in the cause, for the purpose of shewing that a valuation of the Plaintiff's life interest by rule was subject to almost indefinite reduction by reason of habits of intoxication, which, as appears upon the evidence, had rendered his life uninsurable. I think it impossible to hold, that a bona fide purchaser at a public auction, from the assignees of an insolvent whose creditors had little or nothing to look to beyond a precarious life interest in the estates of their debtor, was bound, before he accepted a conveyance, to inquire whether the circumstances justified the assignees in fixing any given amount as a reserved bidding. And the same considerations have a direct bearing upon the question, whether the consideration was inadequate in fact. If it were necessary to find a justification for the purchase, it is at least doubtful, upon the evidence, whether that justification would not be found in the amount to which *Hughes*

(a) 7 Ves. 30.

(b) *Id.* 25, n. See *Bonar v. Cooper*, ante, p. 410.

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limited his tender at the time of the sale, regard being had to the circumstances under which that tender was made, and to which I shall presently advert. The tender, however, I here mention not with reference to its legal effect, but with [*452] reference to its bearing upon the question of value, and upon the conduct of the assignees and the purchaser at the sale. The case of *Lord Aldborough v. Tyre (a)* shows how strongly courts of equity incline to hold, that a sale by public auction is, for purposes like the present, a legal test of market value.

My next inquiry then must be, whether, after the sale and before the conveyance, circumstances attending the sale came to the knowledge of the purchaser, such as would have satisfied an honest man, using reasonable caution, that, in accepting a conveyance from the assignees, he was concurring with them in a breach of trust. The Plaintiff, who comes after conveyance, must make out two things: first, that the facts he relies upon did constitute a breach of trust; and, secondly, that the purchaser was bound to have taken notice that such was the case.

Without examining the effect of the evidence on the question, whether any of the facts I am about to consider came to the knowledge of the purchaser before the completion of the purchase, I will, for the purpose of the argument, assume that he had actual notice of them. If, upon that assumption, none of the facts relied upon would, separately taken, furnish a ground for rescinding an executed contract, I cannot, in a case depending so much upon circumstances and discretion in the assignees, hold, that the purchaser is within the scope of any equitable rule affecting the validity of his purchase, only because those facts, collectively taken, may have had some effect in damping the sale. I do not say what the result might have been, if the Defendant had become a purchaser, with knowledge of any palpable breach of duty by the [*453] assignees. But can I lay stress, sufficient to avoid the conveyance, upon the omission of the policy? not adverting in this place to the observation, that what was not sold at the auction was

(a) 7 Cl. & Fin. 426.

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reserved to the insolvent,—can I say that it was not competent to the assignees to decide what parts of the property of the insolvent they would sell and what retain? and if that were a matter for the discretion of the assignees, can I possibly hold, that the discretion of the assignees was so ruinously exercised in the particular instance of the policy, that it was a fraud in a purchaser to accept a conveyance of the land alone, because the assignees had sold the land separately from the policy? Again, with respect to the premiums upon the policy being a charge upon the land, suppose this to have been a blunder, not admitting of the apology which the facts of this case certainly furnish, would it have been a breach of trust in the assignees, sufficient to avoid the conveyance? If they had made a contract *de novo* with a purchaser, that the premiums should be a charge upon the land, it must have been for the benefit of the Plaintiff that the policy should be kept up; and, in the case of this insolvent, such a stipulation with a purchaser might have been beneficial to him. The cause of the mistake, in representing that the estate was liable to the premiums, if mistake it were, has, I think, been satisfactorily explained. The purchaser has taken a conveyance of the estate, subject to the charge and the benefit of the policy was thereby secured to the estate of the insolvent, to an extent exactly commensurate with the diminution of value in the land sold. I cannot say that the beneficial interest of the insolvent in the aggregate of his estate was in fact injuriously affected by this part of the transactions complained of; and even if it were so, still, if the course taken was one which it was competent to the assignees to take, in [*454] the exercise of an honest though mistaken discretion, that would be a sufficient protection to the purchaser.

Other facts of the class which I am now considering are, the omission to state that the interest of the Plaintiff was unimpeachable for waste; that quit rents were claimable; and that in the property was included manorial rights over the 285 acres of which the farm consisted; and also, the statement respecting the tithes and land-tax. And here I must repeat, that I give no opinion, whether, if this contract rested in *feri*, the Court, upon the whole case, might not have found an excuse for relieving the plaintiff from this sale. And I

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must be distinctly understood as not offering a word in excuse of the assignees, in considering these points, on a question with the purchaser only, after conveyance. But in considering the case of the purchaser only, it is obvious, upon the evidence in the cause, that the value of the privilege of committing waste had become merely nominal; and the same observation applies to the manorial rights. The quit rents were of very small amount, and the title to them was not acknowledged. No prudent purchaser would have given more than a nominal sum for the chance of realizing such an inheritance. With respect to the tithes and land tax, the statement in the particulars of sale was not untrue, though certainly not so expressed as to convey with precision no other meaning than the truth. But except as this may bear upon the adequacy of consideration, I cannot hold that a purchaser was bound to regard it in determining whether he should press for the completion of his contract or resist it. I have no evidence that the purchaser supposed he was making a better bargain in this respect than the facts would entitle him to, or that he has, in substance, done so. The other acts of carelessness in the conduct of the sale, which are not referable to adequacy of consideration only are the "delay in publishing the conditions of sale until the day of the sale,—and the stipulations as to title. It is impossible to hold that these are acts of such a depreciating character as to involve the purchaser in a breach of trust. *Hobson v. Bell* (a). A decision that these are circumstances which should invalidate a conveyance, would, in effect, determine that a purchaser from assignees at a public auction is in principle bound to take upon himself a fiduciary character to the extent of seeing (not merely that the conveyance he accepts is not a breach of trust, for to that extent I might be bound to go), but that they have exercised their discretion in the conduct of the sale in the manner most favourable to the interests of the insolvent. In considering the effect which the stipulation as to the title might have in damping the sale, it is not unimportant to observe, that the estate was in mortgage for large sums of money very recently advanced. This may at once explain the reason why the assignees thought it necessary to make

(a) 2 Beav. 17.

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the stipulation referred to, and why at the same time that stipulation may not have had the depreciating effect attributed to it.

In a case in which concert with the assignees is not to be imputed to the purchaser, I think he might lawfully complete his contract notwithstanding he had notice of the acts complained of by the Plaintiff. If, therefore, the Plaintiff can succeed in rescinding this contract, after conveyance, it must be upon the ground of the tender, to which I shall now briefly advert.

I think I am bound to take it as sufficiently proved that *Babb* had notice of the tender which was made. The first question then is on the actual nature of that tender. The bill states, [*456] that, in consequence of Mr. *Acton*, the *solicitor of the assignees, having threatened to proceed to a sale of the estate, the Plaintiff prevailed upon his solicitor, Mr. *Overton*, to agree immediately to advance the amount requisite to pay the debts exclusive of the mortgages, and therefore Mr. *Hughes*, a clerk of the Plaintiff's said solicitor, on the 12th of July, 1838, on behalf of the Plaintiff, tendered to the assignees the sum of 550*l*. And elsewhere the bill says that *Overton* was ready to advance the money on mortgage, and the same was tendered by *Hughes* accordingly on behalf of the Plaintiff. The answer, however, distinctly says that *Hughes* told *Acton* the mortgage was given up, because the life of the Plaintiff was not insurable, and a sale had been agreed upon, in conformity with which the conveyance was tendered. And the evidence of *Hughes*, who says that *Overton* had abandoned all intention of lending or obtaining money by way of mortgage, because the life was not insurable, supports the answer. This distinction is material. A mortgage would have left the equity of redemption to be dealt with by the assignees. A purchase wholly withdrew it from them. [After minutely commenting on the other facts bearing on this point, his Honor proceeded.] Whether the sale was to be to a stranger, or to the Plaintiff, or to a trustee for the Plaintiff, I am perfectly satisfied that the money tendered was tendered as purchase-money, that the execution of the conveyance was a condition precedent to the payment of the money, and consequently that the withdrawal of the estate from the administration of the

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Court for Relief of Insolvent Debtors was the consideration for the payment. It would be absurd to suppose that the assignees would have refused *Hughes's* tender of a sum of money equal in amount to the scheduled debts, if the estate, subject only to the repayment of that money, was to remain in their hands for administration, in addition to the sum so tendered. Now in this state of things, if a stranger, and not *the Plaintiff, or a trustee [*457] for the Plaintiff, were to be the purchaser, the only risk which the assignees took upon themselves, in determining to proceed with the sale, was the risk of the estate selling for less than the money tendered by *Hughes*; but as more in fact was realized, the Plaintiff could not complain that he is injured by the sale. If, on the other hand, the purchase was to be made for the benefit of the Plaintiff, why has not *Hughes* deposed to that fact? I am called upon to say that the conveyance of the assignees to *Babb*, which is admitted to be good at law, is voidable in equity, by reason of the tender, yet the Plaintiff, by keeping back the deed produced by *Hughes*, and not explaining to me what the real transaction was, refuses to let me know what the tender really was. I think the evidence on this point sustains the case made by the answer, with, perhaps, one exception. Upon the evidence taken alone a doubt might possibly arise, whether *Acton* and the assignees must not have understood that the purchase of which *Hughes* spoke was a purchase to be made for the benefit of the Plaintiff, but the evidence upon this point is by no means so explicit as the importance of the point required that it should be; and if upon this,—which was the Plaintiff's case,—there is any obscurity, upon him the consequences of that obscurity must fall. Looking at the issue tendered by the answer, the Plaintiff is without excuse for not having brought the evidence of *Hughes* to bear directly upon the point. I cannot attribute the omission to a slip or inadvertency. I am clear, therefore, that I ought to give no relief to the Plaintiff upon the case now before me, even if I were satisfied that the Plaintiff was right in his law respecting the construction of the statute 7 Geo. 4, c. 57.

The observation made at the bar, that the assignees could not be

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required to postpone the sale upon a tender made at the
 [*458] last moment, and requiring the examination of the contents of the deed, is not unimportant in its bearings upon this part of the case.

The next,—and if decided in the negative,—the last questions are, whether the argument argued on behalf of the Plaintiff is well founded,—that no creditor could claim an interest in the estate of the insolvent unless his name were in the schedule; and whether, as a consequence of that proposition, a tender by the insolvent, at any moment, of the amount of the debts in the schedule gave him a right in equity to redeem his estate. This argument proceeded on the supposition that no debts could be added to the schedule. The assignees, on the other hand, have contended that the tender by *Hughes* was insufficient, for several reasons: first, because creditors might be added to the schedule; secondly, because the debts in the schedule might be increased in amount, and notice had been given by some of the creditors, that they claimed to increase the amount of their debts; thirdly, because no tender was made to cover the future expenses of litigation in the Insolvent Court; and lastly, that the order of the Court, under which the assignees sold the estate, was imperative, and that they were not bound to incur responsibility by neglecting that order of the Court, authorizing them so to do.

In order to satisfy myself upon this subject, I have carefully considered the act of Parliament (a), and the impression upon my mind is so strong, that creditors not named by the insolvent in his schedule might entitle themselves to have their names and debts added to the schedule, and procure them so to be, that I cannot possibly hold that the assignees were wrong in deciding that they would proceed to a sale, and rely for their indemnity
 [*459] upon the order of the Court, under which they acted.

That they were so indemnified at law is clear; and whatever I might have thought it right to do, in granting or refusing an injunction, if an application to stay the sale had been made before

(a) 7 Geo. 4, c. 57.

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the sale took place, I cannot hold that the sale is void after it has taken place, and the purchaser has got his conveyance.

[His Honor stated the substance of the 10th, 35th, 40th, 41st, 42nd, 43rd, 45th, and 46th sections, observing, that, according to the effect of the 42nd section, the Court is to cause notice of filing the petition, and of the time and place appointed for hearing the petition and schedule, to be given to three distinct classes of creditors: first, the creditors at whose suit the prisoner shall be in custody; secondly, the other creditors in the schedule; and, thirdly, all creditors (if any) not named in the schedule; for after expressly directing that the Court shall decree notice to be given to the first and second classes, the act adds, "and to be inserted in the London Gazette; and also, if the said Court shall think fit, in the Edinburgh and Dublin Gazettes, or either of them; and also in such other newspaper or newspapers as the said Court shall direct."]

Now, advertng to the scope of the petition, namely, that the prisoner may be discharged from prison in respect of all debts owing at the time of presenting his petition; that the schedule is to contain all debts and claims; that notice is to be publicly given of the hearing of the petition, and consideration of the schedule generally, as well as particularly, to the creditors therein named; that any creditor upon proving his debt may oppose the prisoner's discharge, and challenge correctness of the schedule; that the act contemplates the case of the schedule requiring amendment, that its truth may be the subject of examination and report, and that the prisoner is ultimately "to swear to the truth [*460] of it, (considering what the truth so to be sworn to must be), and the rules for making dividends before and after adjudication, I cannot discover the foundation for the arguments of the Plaintiff's counsel, that no creditors of the Insolvent at the time of filing his petition have any interest in his estate under the insolvency, unless the Insolvent has volunteered to put their names upon his schedule. The obvious purport of the act appears to be, that all the debts of the Insolvent shall be ascertained; and I presume the Court would not adjudicate that he be discharged unless and until he submitted to make his schedule true.

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So far, therefore, as the case depends upon the tender alone, I think the assignees were not guilty of a breach of duty in proceeding to a sale after the tender was made.

In these circumstances, without reference to the question whether the purchase to be effected by the deed was proposed to be made for the benefit of the Plaintiff or of a stranger, and whatever the result of any inquiry as to that fact might be, even supposing the case were now open to any such inquiry, it is impossible that a Court of Equity can say that the assignees were guilty of a breach of trust, of which a purchaser was bound to take notice, because they made no better offer, as a condition upon which the sale should be stayed, than that which was made on their behalf by their solicitor *Mr. Acton*, and refused by *Mr. Hughes*, on the part of the proposed purchaser. The bill must be dismissed as against *Babb*, with costs, and as against the assignees without costs. I leave the costs of the assignees to the judgment of the Court for the Relief of Insolvent Debtors, to whom it will properly belong to determine, with reference to the question of costs, whether they have or not taken the proper course in dealing with the Insolvent's estate.

[*461]

*FOSS v. HARBOTTLE.

1843 : 4th, 6th, 7th, 8th and 25th March.

Bill by two of the proprietors of shares in a company incorporated by act of Parliament, on behalf of themselves and all other the proprietors of shares except the Defendants, against the five directors, (three of whom had become bankrupt), and against a proprietor who was not a director, and the solicitor and architect of the company, charging the Defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened, and wasted ; that there had ceased to be a sufficient number of qualified directors to constitute a board ; that the company had no clerk or office ; that in such circumstances the proprietors had no power to take the property out of the hands of the Defendants, or satisfy the liabilities or wind up the affairs of the company ; praying that the Defendants might be decreed to make good to the company the losses and expenses occasioned by the acts complained of ; and praying the appointment of a receiver to take and apply the property of the company in discharge of its liabilities, and secure the surplus : the Defendants demurred.

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Held, that, upon the facts stated, the continued existence of a board of directors *de facto* must be intended; that the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing board was not excluded by the allegations of the bill; that in such circumstances there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of; that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation; and that the demurrers must be allowed.[1]

THE bill was filed in October, 1842, by *Richard Foss* and *Edward Starkie Turton*, on behalf of themselves and all other the shareholders or proprietors of shares in the company called "The Victoria Park Company," except such of the same shareholders or proprietors of shares as were defendants thereto, against *Thomas Harbottle*, *Joseph Adshead*, *Henry Byrom*, *John Westhead*, *Richard Bealey*, *Joseph Denison*, *Thomas Bunting* and *Richard Lane*; and also against *H. Rotton*, *E. Lloyd*, *T. Peet*, *J. Biggs* and *S. Brooks*, the several assignees of *Byrom*, *Adshead* and *Westhead*, who had become bankrupts.

The bill stated, in effect, that in September, 1835, certain persons conceived the design of associating for the purchase of about 180 acres of land, situated in the parish of *Manchester*, belonging to the Defendant *Joseph Denison* and others, and of enclosing and planting the same in an ornamental and park-like manner, and erecting houses thereon with attached gardens and pleasure grounds, and selling, letting, or otherwise disposing thereof; and the Defendants *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Bealey*, *Denison*, *Bunting*, and *Lane*, agreed to form a joint-stock company, to consist of themselves and others, for the said purpose: that in October, 1835, "plans of the land, and a design for laying it out, [*462] were prepared: that after the undertaking had been projected and agreed upon, *Denison* purchased a considerable portion of the said land of the other original owners, with the object of reselling it at a profit, and *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Bunting* and *Lane*,—and one *P. Leicester*, and several other persons, not members of the association,—purchased the said land in parcels of *Denison* and the other owners, so that at the time of pass-

[1] See *Lord v. the Copper Miners' Co.*, 1 Hall & Twells, 85.

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ing the act of incorporation *Harbottle, Adshead, Byrom, Westhead, Bunting* and *Lane* owned more than half of the land in question, the remainder being the property of persons who were not shareholders: that *Denison* and the last named five Defendants made considerable profits by re-selling parts of the said land at increased chief rents before the act was passed.

The bill stated, that between September, 1835, and the beginning of 1836, various preliminary steps were taken for enabling the projectors of the said company to set it on foot: that in April, 1836, advertisements, describing the objects of the proposed company, and the probabilities of its profitable result, were published, in which it was proposed to form the association on the principle of a ton-tine: that the first eight named Defendants and several other persons subscribed for shares in the proposed company, and among others the Plaintiff *Foss* subscribed for two shares, and the Plaintiff *Turton* for twelve shares of 100*l.* each, and signed the contract, and paid the deposit of 4*l.* per share: that at a public meeting of the subscribers, called in May, 1836, it was resolved that the report of the provisional committee should be received, and the various suggestions therein contained be adopted, subject to the approval of the directors, who were requested to complete such purchases of land, and also such other acts as they might consider *necessary for carrying the objects of the undertaking into effect; and it also resolved that *Harbottle, Adshead, Byrom, Westhead* and *Bealey* should be appointed directors, with power to do such acts as they might consider necessary or desirable for the interests of the company; and *Westhead, W. Grant* and *J. Lees*, were appointed auditors, *Lane* architect, and *Bunting* solicitor; that in order to avoid the responsibilities of any ordinary partnership, the Defendants *Harbottle* and others suggested to the subscribers the propriety of applying for an act of incorporation, which was accordingly done; that in compliance with such application, by an act, intituled "An Act for establishing a Company for the purpose of laying out and maintaining an ornamental Park within the Townships of *Rushholme, Charlton-upon-Medlock* and *Moss Side*, in the County of *Lancaster*," which received the royal assent

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on the 5th of May, 1837, (7 Will. 4.), it was enacted that certain persons named in the act including *Harbottle, Adshead, Bealey, Westhead, Bunting* and *Denison* and others, and all and every such other persons or person, bodies or body politic, corporate or collegiate, as had already subscribed or should thereafter from time to time become subscribers or a subscriber to the said undertaking, and be duly admitted proprietor as thereafter mentioned, and their respective successors, executors, administrators and assigns, should be and they were thereby united into a company for the purposes of the said act, and should be and they were thereby declared to be one body politic and corporate by the name of "The Victoria Park Company," and by that name should have perpetual succession and a common seal, and by that name might sue and be sued, plead or be impleaded at law or in equity, and should and might prefer and prosecute any bill or bills of indictment or information against any person or persons who should commit any felony, misdemeanor, or other offence indictable or punishable by the laws of this realm, and should also have full power and authority to purchase and hold lands, tenements, and hereditaments to them, and their successors and assigns, for the use of the said undertaking in manner thereby directed. [The bill stated several other clauses of the act (a).]

(a) The substance of the act, as stated in the bill, was as follows:—Section 3. The company empowered to purchase the lands mentioned in the schedule; 5, and other lands within a mile from the boundry of the said lands; 15, for a sum or sums in gross, or annual rent service or perpetual rent-charge, (notwithstanding the existence of any unperformed contract for the sale of any lands to the company of proprietors, or any of them). 16. Power to lay out the lands; and build thereon, as the directors might think proper. 18. Capital to be 500,000*l.*, and to be applied, first, in payment of the expenses of obtaining the act; and then in payment of the purchase-mones of the lands, and making and maintaining the parks and buildings, and the other purposes of the act. 19. None of the powers given by the act to be exercised before 50,000*l.* should be raised. 20. The capital to be divided in 5000 the shares to be personal estate. 23, 24, 25, 26, 27. Provisions with respect to the nominees of shareholders, and the duration of the interests of the shareholders, on principle of tontine. 29. Register of the names and additions of shareholders and their nominees to be kept by the clerk or secretary of the company, and the common seal affixed thereto. 34. Directors to make calls, and enforce payment of the same,

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[*465] "The bill also stated the schedule annexed to the act, whereby the different plots of the said land, numbered

such calls not to exceed 10*l.* per share at one time, and to be at least two months from each other: the money to be put into the hands of the treasurer, and applied as aforesaid. 35. Declaration and evidence necessary in actions for calls. 38. That the business affairs and concerns of the company shall, from time to time, and at all times hereafter, be under the control of five shareholders, (to be appointed directors) who shall have the entire ordering, managing, and conducting of the company, and of the capital, estates, revenue, effects, and affairs, and other the concerns thereof, and who shall also regulate and determine the mode and terms of carrying on and conducting the business and affairs of the company, conformably to the provisions contained in this act; and no proprietor, not being a director, shall, on any account or pretence whatsoever, in any way meddle or interfere in the managing, ordering, or conducting the company, or the capital, estates, revenue, effects, or other the business, affairs, or concerns thereof, but shall fully and entirely commit, entrust, and leave the same to be wholly ordered, managed, and conducted by the directors for the time being, and the persons whom they shall appoint, save as hereinafter mentioned. 39. That the said *T. Harbottle, J. Adshead, H. Byrom, J. Westhead, and R. Bealy* shall be the present and first directors of the company. 40. Three directors to constitute a board, and the acts of three or more to be as effectual as if done by the five. 42. Minutes of the proceedings of every board to be entered in a book to be kept by the clerk or secretary at the office of the company. 43. The board of directors for the time being to have full power and authority to appoint or remove the banker, broker, architect, surveyor, solicitor, builder, treasurer, and clerk, and also a secretary, and all other agents, officers, clerks, and servants. 45. Books of account of all the transactions of the company to be kept, and half-yearly reports and balance sheets to be made: the proprietors to have access to, and to be at liberty to inspect all books, accounts, documents, and writings belonging to the company, at all reasonable times. 46. That a meeting of the proprietors of the company shall be convened and held on the first Monday in the month of July, 1837, and on the same day in every succeeding year, at eleven o'clock in the forenoon, at their office or such other convenient place in *Manchester* as the directors may think proper to appoint, of which meeting the clerk or secretary for the time being of the company shall give fourteen days' previous notice, by an advertisement in one of the *Manchester* newspapers; and each meeting so to be convened and held shall be called "The Annual General Meeting," and the proprietors respectively qualified to act and vote therein, according to the provisions therein contained, and who personally, by such proxy as hereinafter authorised, shall attend the same, shall have full power and authority to decide upon all such matters and questions as by virtue of this act shall be brought before such annual general meeting. 47. Board of directors empowered to call extraordinary general meetings. 48. That ten or more proprietors of the company for the time being, qualified to vote as hereinafter mentioned, or three full fourth parts in number and value of all the proprietors for the time being of the company, may, at any time, by writing under their hands, require the board of directors for the

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*from 1 to 37, were stated to have been purchased by the [*466]
Victoria Park Company from the various persons whose

time being to call an extraordinary general meeting of the proprietors, and every such requisition shall set forth the object of such extraordinary meeting, and shall be left with the clerk or secretary for the time being at the principal office of the company, at least one calendar month before the time named in the requisition for the meeting to be holden, otherwise the said board shall not be bound to take notice thereof; but in case the directors shall refuse or neglect for fourteen days, after such requisition shall be so left as aforesaid, to call such extraordinary meeting, then, the proprietors signing the requisition may, for the purposes mentioned in such requisition, call an extraordinary general meeting of the proprietors, by notice signed by them, and advertised in one or more of the *Manchester* newspapers, at least fourteen days before the time fixed for holding the meeting; and in every such advertisement, the object of such extraordinary meeting, and the day and hour and place in the town of *Manchester* of holding the same, and the delivery of the requisition to the said board, and of its refusal to call such extraordinary meeting, shall be specified. 65. Two of the directors selected by lot amongst themselves, to retire from office at the annual general meeting in July, 1841, and be replaced by two qualified proprietors, to be then elected by the majority of votes at such meeting, and two others, the longest in office or so selected to retire, at every subsequent annual general meeting; but the retiring directors to be re-eligible. 67. No person shall be a director who shall not be a holder in his own right of the number of shares hereinafter mentioned in the capital of the company, viz. who shall not be a holder of ten shares at least, so long as the total number of the shares shall exceed 500; and from and after the total number of the company shall be reduced to and shall not exceed 100, then, who shall not be a holder of five shares at least; and if any of the then or future directors shall cease to hold the respective number of shares aforesaid in his own right, his office as director shall thereupon and thenceforth become vacated. 68. Directors may vacate by resigning their offices. 70. Board of directors to appoint qualified persons to fill up the offices of directors dying, resigning, removed, or becoming disqualified before their time of retirement; such appointments to be subject to the approbation of the next general meeting. 73. Cheques, bills, notes, and other negotiable securities, to be signed, &c. by the treasurer or such other officer of the company as the board, should by minute appoint, and no others to be binding on the company. 74. That all actions, suits, and other proceedings at law or in equity, to be commenced and prosecuted by or on behalf of the company, shall and lawfully may be commenced and instituted or prosecuted in the name of the treasurer, or any one of the directors of the company for the time being, as the nominal plaintiff for and on behalf of the company; and all actions, &c. against the company shall be commenced and instituted and prosecuted against the treasurer, or any one of the directors of the company for the time being, as the nominal defendant for and on behalf of the company. 78. Directors to have power to sell or declare forfeited shares, for non-payment of debts or liabilities to the company. 83, 84, 85. Shares vested in executors, legatees, and assignees of proprietors, upon being transferred and duly registered, and such executors, legatees, as-

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- [*467] "names were therein set forth, and including the following names: "Mr. *P. Leicester* and others;"—"Mr. *Lacy* and another;"—"Mr. *Lane*" and "Mr. *Adshead*:" that
- [*468] "the land so stated to be purchased of "*P. Leicester* and others, was at the time of passing of the act vested partly in *P. Leicester* and partly in *Westhead*, *Bunting*, and *Byrom*, and the land so stated to be purchased of "*Lacy* and another," was at the time of the passing of the act vested partly in Mr. *Lacy* and partly in *Lane*.

The bill stated, that the purchase and sale of the said land as aforesaid was the result of an arrangement fraudulently concerted and agreed upon between *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Denison*, *Bunting*, and *Lane*, at or after the formation of the company was agreed upon, with the object of enabling themselves to derive a profit or personal benefit from the establishment of the said company; and that the arrangement amongst the persons who were parties to the plan was, that a certain number from amongst

signees, &c. to be liable to calls, &c., as if original proprietors. 90. After one half of the capital of 500,000*l.* should have been paid up, the board of directors, with sanction of a general meeting, empowered to borrow at interest any sum or sums of money, not exceeding 150,000*l.* in the whole, on the security of the lands, property, and effects of the company, by deed or writing under their common seal: entries of all such mortgages, and the particulars thereof to be made in a book to be kept by the clerk of the company, and such book to be open for the perusal at all reasonable times of any proprietor or creditor of the company. 98. Mortgagees not required to see to the necessity for or application of the mortgage money. 105. Board of directors, with the sanction of two successive general meetings, and the proportion in number and value of the proprietors and shares therein mentioned, empowered to put an end to the tenure by way of tontine, and discharge the shares from all benefit of survivorship. 107, 108. Power to dissolve the company, and wind up the affairs thereof, in manner therein mentioned, under the sanction of such general meetings. 112. Notices to proprietors sent by post, according to their addresses in the register, to be sufficient. 129. That in all cases wherein it may be requisite or necessary for any person or party to serve any notice, or any writ or other legal proceedings upon the said company, the service thereof upon the clerk or secretary to the company, or any agent or officer employed by the said director, or leaving the same at the office of such clerk or secretary, agent or officer, or at his last or usual place of abode, or upon any one of the said directors, or delivery thereof to some inmate at his last or usual place of abode, shall be deemed good and sufficient service of the same respectively on the company or their directors.

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themselves should be appointed directors, and should purchase for the company the said plots of land from the persons in whom they were vested, at greatly increased and exorbitant prices: that it was with a view to carry the arrangement into effect that *Harbottle*, *Adshead*, *Byrom*, and *Westhead* procured themselves to be appointed directors, and *Denison* procured himself to be appointed auditor: that accordingly, after the plots of land had become vested in the several persons named in the schedule, and before the passing of the act, the said directors, on behalf of the company, agreed to purchase the same from the persons named in the schedule, at rents or prices greatly exceeding those at which the said persons had purchased the same: that after the act was passed, *Harbottle*, *Adshead*, *Byrom*, *Westhead*, and *Bealy* continued to act as directors of the incorporated company in the same manner as before: that *Adshead* continued to act as director until the 18th of July, 1839, *Byrom* until the 2nd of December, 1839, and [469] *Westhead* until the 2nd of January, 1840, at which dates respectively fiats in bankruptcy were issued against them, and they were respectively declared bankrupts, and ceased to be qualified to act as directors, and their offices as directors became vacated.

The bill stated that upwards of 3000 shares of 100*l.* in the capital of the company were subscribed for: that the principle of *ton-tine* was abandoned: that before 1840, calls were made, amounting, with the deposit, to 35*l.* per share, the whole of which were not, however, paid by all the proprietors, but that a sum exceeding 35,000*l.* in the whole was paid.

The bill stated, that, after the passing of the act, *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Bunting*, and *Lane*, with the concurrence of *Denison* and of *Bealey*, proceeded to carry into execution the design which had been formed previously to the incorporation of the company, of fraudulently profiting and enabling the other persons who had purchased and then held the said land, to profit by the establishment of the company and at its expense; and that the said directors accordingly, on behalf of the company, purchased, or agreed to purchase, from themselves, *Harbottle*, *Adshead*, *Byrom*,

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and *Westhead*, and from *Bunting* and *Lane*, and the other persons in whom the said land was vested, the same plots of land, for estates corresponding with those purchased by and granted to the said vendors, by the original owners thereof, charged with chief or fee-farm rents, greatly exceeding the rents payable to the persons from whom the said vendors had so purchased the same; that of some of such plots the conveyances were taken to the Victoria Park Company, by its corporate name; of others, to *Harbottle*, *Adshead*, *Byrom*, *Westhead* and *Bealey*, as directors in trust for the company; [*470] and others rested in agreement only, without conveyance; that by these means the company took the land, charged not only with the chief rents reserved to the original land owners, but also with additional rents, reserved and payable to *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Denison*, *Bunting*, *Lane*, and others: that in further pursuance of the same fraudulent design, the said directors, after purchasing the said land for the company, applied about 27,000*l.* of the monies in their hands, belonging to the company, in the purchase or redemption of the rents so reserved to themselves, *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Denison*, *Bunting*, *Lane*, and others, leaving the land subject only to the chief rent reserved to the original landowners.

The bill stated, that the plans of the park were contrived and designed by *Lane*, in concert with *Denison*, the directors, and *Bunting*, so as to render the formation of the park the means of greatly increasing the value of certain parcels of land, partly belonging to *Denison* and partly to *Lane*, situated on the outside of the boundary line of the park, but between such boundary line and one of the lodges and entrance gates, called *Oxford Lodge* and *Gate*, erected on a small part of the same land purchased by the company; and through which entrance, and the land so permitted to be retained by *Denison* and *Lane*, one of the principal approaches to the park was made; that the said land so retained by *Denison* and *Lane* was essentially necessary to the establishment of the park, according to the plans prepared by *Lane*, and the same was virtually incorporated in the park, and houses erected thereon would enjoy all the advan-

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tages of the park, and plots thereof were in consequence sold by *Denison* and *Lane* for building land at enhanced prices.

*The bill stated, that, after the purchase of the land [*471] as aforesaid, the directors proceeded to carry into effect the design of converting the same into a park, and they accordingly erected lodges and gates, marked out with fences the different crescents, terraces, streets, and ways ; formed drains and sewers, and made road-ways, and planted ornamental trees and shrubs : that they also caused to be erected in different parts of the park several houses and buildings, some of which only were completed ; and that the directors alleged the monies expended in the roads, drains, and sewers amounted to 12,000*l.*, and in the houses and buildings to 39,000*l.*, or thereabouts : that the said directors sold and let several plots of land, and also sold and let several of the houses and buildings, and received the rents and purchase-money of the same.

The bill stated, that *Harbottle*, *Denison*, *Bunting*, and *Lane* did not pay up their calls, but some of them retained part, and others the whole thereof ; *Harbottle* and *Lane* claiming to set off the amount of the calls against the chief rents of the lands which they sold to the company, *Bunting* claiming to set off the same against the chief rents, and the costs and charges due to him from the company ; and *Denison* claiming to set off the amount of the calls against the rents payable to him out of the land which he sold to persons who re-sold the same to the company.

The bill stated, that owing to the large sums retained out of the calls, the sums appropriated by the said directors to themselves, and paid to others in reduction of the increased chief rents, and payment of such rents, and owing to their having otherwise wasted and misapplied a considerable part of the monies belonging to the company, the funds of the company which came to *their hands shortly after its establishment were exhausted : [*472] that the said directors, with the privity, knowledge, and concurrence of *Denison*, *Bunting*, and *Lane*, borrowed large sums of money from their bankers upon the credit of the company : that, as a further means of raising money, the said directors, and *Bunting* and *Lane*, with the concurrence of *Denison*, drew,

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made, and negotiated various bills of exchange and promissory notes; and that the said directors also caused several bonds to be executed under the corporate seal of the company for securing several sums of money to the obligees thereof: that by the middle or latter part of the year 1839, the directors, and *Bunting* and *Lane*, had come under very heavy liabilities; the chief rents payable by the company were greatly in arrear, and the board of directors, with the concurrence of *Denison*, *Bunting*, and *Lane*, applied to the United Kingdom Life Assurance Company to advance the Victoria Park Company a large sum of money by way of mortgage of the lands and hereditaments comprised in the park; but the Assurance Company were advised that the Victoria Park Company were, by the 90th section of their act, precluded from borrowing money on mortgage, until one half of their capital (namely, 500,000*l.*) had been paid up, and on that ground declined to make the required loan: that the directors finding it impossible to raise money by mortgage in a legitimate manner, resorted to several contrivances for the purpose of evading the provisions of the act, and raising money on mortgage of the property of the company, by which means several large sums of money had been charged by way of mortgage or lien upon the same: that to effect such mortgages or charges, the directors procured the persons who had contracted to sell plots of land to the company, but had not executed conveyances, to convey the same, by the direc-

[*473] tion of the board to some other person or persons in mortgage, and afterwards to convey the equity of redemption to the directors in trust for the company: that the directors also conveyed some of the plots of land which had been conveyed to them in trust for the company to some other persons, by way of mortgage, and stood possessed of the equity of redemption in trust for the company: that, for the same purpose, the board of directors caused the common seal of the company to be affixed to several conveyances of plots of land which had been conveyed to the company by their corporate name, and to the directors in trust for the company, whereby the said plots of land were expressed to be conveyed for a pretended valuable consideration to one or more of

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the said directors absolutely, and the said directors or director then conveyed the same to other persons on mortgage to secure sometimes monies advanced to the said directors, and by them paid over to the board, in satisfaction of the consideration-monies expressed to be paid for the said prior conveyances under the common seal, sometimes antecedent debts in respect of monies borrowed by the board, and sometimes monies which had been advanced by the mortgagees upon the security of the bills and notes which had been made or discounted as aforesaid: that, in other cases, the said directors and *Bunting* deposited the title-deeds of parcels of the land and buildings of the company with the holders of such bills and notes, to secure the repayment of the monies due thereon, and in order to relieve the parties thereto: that, by the means aforesaid, the directors, with the concurrence of *Denison*, *Bunting*, and *Lane*, mortgaged, charged, or otherwise incumbered the greater part of the property of the company: that many of such mortgagees and incumbrancers had notice that the said board of directors had not power under the act to mortgage or charge the property of the company, and that the said mortgages, charges, and incumbrances were [*474] fraudulent and void as against the company, but that the defendants allege, that some of the said incumbrances were so planned and contrived, that the persons in whose favour they were created had not such notice.

That the said directors having exhausted every means which suggested themselves to them of raising money upon credit, or upon the security of the property and effects of the company, and being unable by those means to provide for the whole of the monies due to the holders of the said bills and notes, and the other persons to whom the said directors in the said transactions had become indebted as individuals, and to satisfy the debts which were due to the persons in whose favour the said mortgages and incumbrances had been improperly created, and in order to release themselves from the responsibility which they had personally incurred by taking conveyances or demises of parts of the said land to the said directors as individuals in trust for the company, containing covenants on their parts for payment of the reserved rents,—the said directors resolved to convey

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and dispose of the property of the company, and they accordingly themselves executed, and caused to be executed under the common seal of the company, divers conveyances, assignments, and other assurances, whereby divers parts of the said lands and effects of the company were expressed to be conveyed or otherwise assured absolutely to the holders of some of the said bills and notes, and some of the said mortgagees and incumbrancers, in consideration of the monies thereby purported to be secured ; and also executed, and caused to be executed under the common seal of the company, divers conveyances and assurances of other parts of the said lands to the persons who sold the same to the company, in consideration [*475] of their releasing them from the payments of the rents reserved and payable out of the said lands ; that many of such conveyances had been executed by *Harbottle*, *Adshead*, *Westhead*, and *Bealey*, and a few by *Byrom*, who had been induced to execute them by being threatened with suits for the reserved rents : that *Harbottle*, *Adshead*, *Byrom*, *Westhead*, and *Bealey* threatened and intended to convey and assure the remaining parcels of land belonging to the company to the holders of others of the said bills and notes, and to others of the said mortgagees and incumbrancers and owners of the chief rents, in satisfaction and discharge of the said monies and rents due and to become due to them respectively.

The bill stated, that, upon the bankruptcy of *Byrom*, *Adshead*, and *Westhead*, their shares in the company became vested in the Defendants, their assignees, and that they (the bankrupts) had long since ceased to be, and were not, shareholders in the company : that the whole of the land re-sold by them was vested in some persons unknown to the Plaintiffs, but whose names the Defendants knew and refused to discover : that, upon the bankruptcy of *Westhead*, there ceased to be a sufficient number of directors of the company to constitute a board for transacting the business of the company, in manner provided by the act, and *Harbottle* and *Bealey* became the only remaining directors whose office had not become vacated, and no person or persons had been appointed to supply the vacancies in the board of directors occasioned by such bankruptcies, and

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consequently there never had been a properly constituted board of directors of the company since the bankruptcy of *Westhead*.

That *Byrom*, *Adshead*, and *Westhead*, nevertheless, after their respective bankruptcies, executed the "several [*476] absolute conveyances and other assurances of the lands and property of the company, which were so executed for the purposes and in manner aforesaid, after the directors had exhausted their means of raising money upon credit, or upon the security of the property of the company.

That about the end of the year 1839, or commencement of the year 1840, the directors discharged *Brammell*, the secretary of the company, and gave up the office taken by the company in *Manchester*, and transferred the whole or the greater part of the title-deeds, books, and papers of the said company into the hands of *Bunting*; and from that time to the present the company had had no office of its own, but the affairs of the company had been principally conducted at the office of *Bunting*.

That the only parts of the land bought by the company which had not been conveyed away either absolutely or by way of mortgage, and the only part of the other property and effects of the company which had not been disposed of and made way with in manner aforesaid remained vested in, and in the order and disposition of, *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Bealy*, and *Bunting*, in whose custody or power the greater part of the books, deeds, and papers belonging to the company which had not been made away with remained: that by the fraudulent acts and proceedings in the premises to which *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Bealy*, and *Bunting* were parties, the property and effects of the said company had been and then were involved in almost inextricable difficulties, and if such property and effects were any longer allowed to remain in their order and disposition, the same would be in danger of being wholly dissipated and irretrievably "lost: that the said com- [*477] pany were then largely indebted to their bankers and other persons who had bona fide advanced money to the company, and to the builders and other persons who had executed some of the works in the park, and provided materials for the same; while, in

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consequence of the property of the company having been wasted and improperly disposed of by the directors, there were at present no available funds which could be applied in satisfaction of the debts of the company, and that some of the creditors of the said company had obtained judgments in actions at law brought by them against the company for the amount of their debts, on which judgments interest was daily accumulating.

The bill stated, that in the present circumstances of the company, and the board of directors thereof, the proprietors of shares had no power to take the property and effects of the company out of the hands of *Harbottle, Adshead, Byrom, Westhead, Bealey, and Bunting*, and they had no power to appoint directors to supply the vacancies in the board occasioned by the said bankruptcies,—and the proprietors of shares in the company had no power to wind up, liquidate, or settle the accounts, debts, or affairs of the company, or to dissolve the company, nor had they any power to provide for and satisfy the existing engagements and liabilities of the company with a view to its continuance, and the prosecution of the undertaking for which it was established, without the assistance of the court : that if a proper person were appointed by the court to take possession of and manage the property and effects of the company, and if the company were to be repaid the amount of all losses and expenses which it had sustained or incurred by reason of the fraudulent and improper acts and proceedings of the defendants in the [*478] premises, and "which the defendants, or any of them, were liable to make good to the said company, as thereafter prayed ; and if the company were decreed to take and have conveyed to them so much of the said land which was retained by *Denison* and *Lane* as aforesaid, upon paying or accounting to them for the fair value thereof at the time when the undertaking was first projected ; and *Denison* and *Lane* were to pay or account to the said company for the price received by them, for so much of the same land as had been sold by them, over and above what was the fair price for the same at the time the undertaking was first projected ; and if the mortgages, charges, incumbrances, and liens, and the said conveyances and other assurances, by means of which the

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property and effects of the company had been improperly incumbered and disposed of, which could be redeemed or avoided, as against the persons claiming thereunder, were redeemed and set aside, and the property and effects of the company thereby affected were restored to it, and the Defendants, who had not become bankrupt, and who had not paid up, but ought to have paid up, into the joint stock capital of the company, the amounts of the several calls made by the directors on their respective shares, were to pay up the same,—the lands, property, and effects of the company would not only be sufficient to satisfy the whole of its existing debts and liabilities, but leave a surplus, which would enable the company to proceed with, and either wholly or in part accomplish, the undertaking for which it was incorporated.

The bill stated, that the Defendants concealed from the Plaintiffs, and the other shareholders in the company, who were not personally parties thereto, the several fraudulent and improper acts and proceedings of the said directors and the said other Defendants, and "the Plaintiffs and the other shareholders had [*479] only recently ascertained the particulars thereof, so far as they were therein stated, and they were unable to set forth the same more particularly,—the Defendants having refused to make any discovery thereof, or to allow the Plaintiffs to inspect the books, accounts, or papers of the company.

The bill charged that *Harbottle* and *Bealy*, and the estates of *Adshead*, *Byrom*, and *Westhead*, in respect of that which occurred before their said bankruptcies, and *Adshead*, *Byrom*, and *Westhead*, as to what occurred since their said bankruptcies, were liable to refund and make good to the company the amount of the losses and expenses which it had sustained in respect of the fraudulent and improper dealings of the said directors of the company with its lands and property: that *Denison*, *Bunting*, and *Lane* had counselled and advised the directors in their said proceedings, and had derived considerable personal benefit and advantage therefrom: that *Denison*, *Bunting*, and *Lane* were all parties to the said fraudulent scheme planned and executed as aforesaid, by which the several plots or parcels of land in the park were purchased and

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re-sold to the said company at a profit and at a price considerably exceeding the real value of the same, and that *Denison*, *Bunting*, and *Lane* had derived considerable profit from the increased price or chief rents made payable out of the several plots or parcels of which were purchased and re-sold by them in manner aforesaid, and from the monies which were paid to them as a consideration for the reductions of the same chief rents as before mentioned.

The bill charged that several meetings, and extraordinary [*480] nary general meetings, and other meetings of *the shareholders of the company, were duly convened and held at divers times, between the time when the company was first established in the year 1841, and particularly on the several days or times thereafter mentioned, (naming ten different dates, from July 1837 to December 1839), and that at such meetings false and delusive statements respecting the circumstances and prospects of the company were made by the directors to the proprietors who attended such meetings, and the truth of the several fraudulent and improper acts and proceedings therein complained of was not disclosed.

The bill charged, that, under the circumstances, *Denison*, *Bunting*, and *Lane*, having participated in and personally benefited by and concealed from the other shareholders the several fraudulent and improper acts aforesaid, were all jointly and severally liable together, with the said directors, to make good to the company the amount of the losses and expenses which had been or might be incurred in consequence of the said wrongful and fraudulent acts and proceedings as they were parties or privies to: that *Harbottle*, *Byrom*, *Adshead*, *Westhead*, and *Bealy*, respectively, had still some of the property and effects belonging to the company: that the said last-named Defendants had not paid up the calls due and payable on their respective shares: that the Plaintiffs had as yet paid only three of the calls on their shares, not having paid the remainder in consequence of learning, that, owing to some misconduct of the directors, the affairs of the company were in difficulties, the cause of which difficulties the Plaintiffs had but lately, and with considerable difficulty, ascertained to have arisen from the proceedings aforesaid, but in all other respects the Plaintiffs had conformed

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to the provisions of the act: that there were not any *shareholders in the company who had not paid up the [*481] calls on their shares besides the Plaintiffs and the said Defendants: that the names and places of abode of the other persons who are not shareholders in the company, but are interested in or liable in respect of any of the said matters, were unknown to the Plaintiffs, and the Defendants ought to discover the same: that the number of shareholders in the company was so great, and their rights and liabilities were so subject to change and fluctuation, by death and otherwise, that it would be impossible to prosecute the suit with effect if they were all made parties thereto.

The bill charged that *Bunting*, claimed a lien upon the documents in his possession belonging to the company for the costs of business done by him as the attorney of the company, but a great part of such business consisted of the fraudulent acts aforesaid; and that he had received out of the funds of the company divers large sums of money exceeding the amount properly due to him: that *Bunting* had deposited some of the deeds belonging to the company with certain bankers at *Liverpool*, and among the rest the contract executed by the Plaintiffs and the other shareholders before the act was passed, as a security for the payment of a bill of exchange for 8000*l.*, to which *Bunting* was individually a party, but for which he untruly pretended that the company was responsible; and that the holders of such threatened to sue the Plaintiffs for the said 8000*l.*, as parties to the contract, on the ground that the capital was not paid up; and also, that the said directors threatened to cause actions at law to be brought against the Plaintiffs, under the powers of the act, in the name of *Harbottle* or *Bealey*, as the nominal Plaintiff on behalf of the company, for the amount of the unpaid calls on their shares.

*The bill charged, that *Harbottle* and *Bealey* were two directors of the company, but they respectively refused to [*482] use or allow either of their names to be used as the nominal Plaintiffs in this suit on behalf of the company; but that *Harbottle* was a necessary party, not only in respect of his liability, but also as a nominal Defendant on behalf of the company.

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After various charges, recapitulating in terms the alleged title of the Plaintiffs to the relief and discovery sought by the prayer, the bill prayed that an account might be taken of all monies received by the Defendants *Harbottle, Adshead, Byrom, Westhead, Bealey, Denison*, and *Lane* or any of them, for the use of the company, or which but for their wilful default might have been received, and of the application thereof; also, an account of the losses and expenses incurred in consequence of the said fraudulent and improper dealings of the Defendants with the monies, lands, and property of the company which they or any of them were liable to make good, and that they might be respectively decreed to make good the same, including in particular the profits made by *Harbottle, Denison, Bunting* and *Lane*, by buying and re-selling the said land and the profits made by *Denison* and *Lane* out of the said land retained by them; and that *Denison* and *Lane* might be decreed to convey the residue of the said land to the company, upon payment of the fair value thereof at the time the undertaking was projected: that it might be declared that the said mortgages, charges, incumbrances, and liens upon the lands and property created as aforesaid, so far as regards the Defendants who executed the same or were privy thereto, were created fraudulently and in violation of the provisions of the act, and that *Harbottle, Bealey, Denison, Bunting*, and *Lane*, might be decreed to make good to the company [*483] ny the principal *money and interest due and owing upon security of such of the mortgages, charges, and liens as were still subsisting, with all costs sustained by the company in relation thereto: and that it might be declared that *Harbottle, Adshead, Byrom, Westhead*, and *Bealey*, by executing the said conveyances and assurances of the lands and property of the company to the said mortgagees, holders of notes and bills, and others, committed a fraudulent breach of trust, and that *Harbottle, Adshead, Byrom, Westhead, Bealey, Denison, Bunting*, and *Lane* might be decreed to make good to the company the purchase-money and rents paid by the company for such lands, and expended in building and improving the same, with interest and expenses; and that the monies so recovered from the Defendants might be applied in redeem-

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ing and re-purchasing the said lands, and restoring them to the company. And that inquiries might be directed to ascertain which of the mortgages and incumbrances, and of the conveyances and assurances, of the lands and property of the company could be avoided and set aside as against the persons claiming the benefit thereof, and that proceedings might be taken for avoiding them accordingly. And that an account might be taken of all the property and effects of the company, and the unpaid calls sued for and recovered, and that a sufficient part of such property might be applied in liquidating the existing debts and liabilities of the company, and the residue secured for its benefit. And that, for the purposes aforesaid, a receiver might be appointed to take possession of, recover, and get in the lands, property, and effects of the company, and for that purpose to sue in the names of *Harbottle* and *Bealey*, or otherwise, as occasion might require; and that *Harbottle*, *Adshead*, *Byrom*, *Westhead*, *Bealey* and *Bunting* might be decreed to deliver up to such receiver the property, effects, deeds, muniments, [*484] and documents belonging to the company. And that the same Defendants might be restrained by injunction from holding, receiving, or intermeddling with the property and effects of the company, and from executing, or causing to be executed, under the common seal of the company, any deed or instrument conveying, assigning or disposing of the same. And that *Harbottle*, *Denison*, *Bunting* and *Lane* might be restrained from entering or distraining upon any of the said land sold by them to or in trust for the company as aforesaid. And the Plaintiffs thereby offered to pay into court the amount of the unpaid calls due from the company.

The Defendants *Harbottle*, *Adshead*, and *Westhead* demurred to the bill, assigning for cause, want of equity, want of parties, and multifariousness; and suggesting that all the proprietors of shares in the company, the assignees of *P. Leicester*, and the owners of land named in the schedule to the act, were necessary parties. The Defendant *Bealey*, the Defendant *Denison*, and the Defendants *Bunting* and *Lane*, also put in three several demurrers, assigning like causes.

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Mr. *Lowndes* and Mr. *Rolt*, in support of the demurrers of *Harbottle*, *Adshead*, and *Westhead*, and of *Bunting* and *Lane*.

Mr. *Walker* and Mr. *Glasse*, in support of the demurrers of *Bealey* and *Denison*.

Mr. *James Russell*, Mr. *Roupell*, and Mr. *Bartrum*, for the bill.

[*485] "On the part of the Defendants, it was contended, that the suit complaining of injuries to the corporation was wholly informal, in having only some of its individual members, and not the corporation itself, before the Court; that this defect would not be cured by adding the corporation as parties Defendants,—for the Plaintiffs were not entitled to represent the corporate body, even as distinguished from the Defendants and for the purpose of impeaching the transactions complained of; and the Plaintiffs' bill could not therefore be sustained.

It was further argued, that the Plaintiffs, if they had any ground for impeaching the conduct of the Defendants, might have used the name of the corporation; and, in that case, it would have been open to the Defendants, or to the body of directors or proprietors assuming the government of the company, to have applied to the Court for the stay of proceedings, or to prevent the use of the corporate name; and, upon that application, the Court would have inquired into the alleged usurpation or abuse of authority, and determined whether the Plaintiff should be permitted to proceed. Or, the suit might have been in the shape of an information by the Attorney-General, to correct the alleged abuse of powers granted for public purposes. The statements of fact in the bill, it was also contended, did not support the general charges of fraud upon which the title to relief was founded. Several other points of equity, as applicable to the cases made against the several Defendants, and in respect of the suggested defects of parties, were also made, but the judgment did not turn on these points.

[*486] On the part of the Plaintiffs, so far as related to the point on which the decision proceeded, namely, their right to

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sustain the bill on behalf of themselves and the other shareholders against the Defendants, without regard to the corporate character of the body, it was argued, that the company was not to be treated as an ordinary corporation; that it was in fact a mere partnership, having objects of private benefit, and that it must be governed by rules analogous to those which regulated partnerships or joint stock companies, consisting of numerous persons, but not incorporated. The act of incorporation was intended to be beneficial to the company, and to promote the undertaking, but not to extinguish any of the rights of the proprietors *inter se*. The directors were trustees for the Plaintiffs to the extent of their shares in the company; and the fact that the company had taken the form of a corporation, would not be allowed to deprive the *cestui que trusts* of a remedy against their trustees for the abuse of their powers. The act of incorporation, moreover, expressly exempted the proprietors of the company, or persons dealing with the company, from the necessity of adopting the form of proceeding applicable to a pure corporation; for the 74th section (a) enabled them to sue and be sued in the name of the treasurer, or any one of the directors for the time being; the bill alleged, that the two remaining directors had refused to institute the suit, and shewed in fact that it would be against their personal interest to do so, inasmuch as they were answerable in respect of the transactions in question; if the plaintiffs could not, therefore, institute the suit themselves, they would be remediless. The directors were made Defendants; and, under the 74th clause of the act, any one of the directors might be made the "nominal representatives of the company; the corporation [*487] was therefore distinctly represented in the suit. The present proceeding was in fact the only form in which the proprietors could now impeach the conduct of the body to whom their affairs had been intrusted. The 38th section expressly excluded any proprietor, not being a director, from interfering in the management of the business of the company on any pretence whatever. The extinction of the board of directors by the bankruptcy and consequent disqualification of three of them, (sect. 67), and the want of any

(a) *Supra*, p. 466, n.

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clerk or office, effectually prevented the fulfilment of the forms which the 46th, 47th, and 48th sections of the act required, in order to the due convening of a general meeting of proprietors competent to secure the remaining property of the company, and provide for its due application.

The following cases were cited during the argument: *The Charitable Corporation v. Sutton* (a), *Attorney-General v. Jackson* (b), *Adley v. The Whitstable Company* (c), *Blackburn v. Jepson* (d), *Hichens v. Congreve* (e), *Blain v. Agar* (f), *Richards v. Davies* (g), *Ranger v. Great Western Railway Company* (h), *Seddon v. Connell* (i), *Preston v. Grand Collier Dock Company* (k), *Attorney-General v. Wilson* (l), *Wallworth v. Holt* (m), *Bligh v. Blent* (n), 6 *Viner*, Ab. 306, tit. *Corporation*, U., *Bacon*, Ab., tit. *Statute*, I. 2.

[*488] VICE-CHANCELLOR:—

The relief which the bill in this case seeks, as against the Defendants who have demurred, is founded on several alleged grounds of complaint: of these it is only necessary that I should mention two, for the consideration of those two grounds involves the principle upon which I think all the demurrers must be determined. One ground is, that the directors of the Victoria Park Company, the Defendants *Harbottle*, *Adshead*, *Byrom*, and *Bealy*, have, in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or, rather, taken to themselves out of the monies of the company a price exceeding the value of such lands: the other ground is, that the Defendants

(a) 2 Atk. 400.

(c) 17 Ves. 315; 2 M. & Sel. 53; 19 Ves. 304; 1 Mer. 107. S. C.

(d) 3 Swans. 138.

(f) 2 Sim. 289.

(h) 1 Railway Cases, 1.

(k) 11 Sim. 327, S. C.; 2 Railway Cases, 335.

(l) Cr. & Ph. 1.

(n) 2 Y. & Coll. 295; Per *Alderson*, B.

(b) 11 Ves. 365.

(e) 4 Russ. 562.

(g) 2 R. & M. 347.

(i) 10 Sim. 58, 79.

(m) 4 Myl. & Cr. 619.

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have raised money in a manner not authorized by their powers under their act of incorporation; and, especially, that they have mortgaged or incumbered the lands and property of the company, applied the monies thereby raised in effect, circuitously, to pay the price of the land which they had so bought of themselves.

I do not now express any opinion upon the question, whether, leaving out of view the special form in which the Plaintiffs have proceeded in the suit, the bill alleges a case in which a Court of Equity would say that the transactions in question are to be opened or dealt with in the manner which this bill seeks that they should be; but I certainly would not be understood by any thing I said during the argument to do otherwise than express my cordial concurrence in the doctrine laid down in the case of *Hichens v. Congreve* (a), and other cases of that class. I take those cases to be in accordance with the principles of this Court, and to be founded on "justice and common sense. Whether [*489] particular cases fall within the principle of *Hichens v.*

Congreve, is another question. In *Hichens v. Congreve*, property was sold to a company by persons in a fiduciary character, the conveyance reciting that 25,000*l.* had been paid for the purchase; the fact being, that 10,000*l.* only had been paid, 15,000*l.* going into the hands of the persons to whom the purchase was entrusted. I should not be in the least degree disposed to limit the operation of that doctrine in any case, in which a person projecting the formation of a company invited the public to join him in the project, on a representation that he had acquired property which was intended to be applied for the purposes of the company. I should strongly incline to hold that to be an invitation to the public to participate in the benefit of the property purchased, on the terms on which the projector had acquired it. The fiduciary character of the projector would, in such a case, commence from the time when he first began to deal with the public, and would of course be controlled in equity by the representation he then made to the public. If persons, on the other hand, intending to form a company, should purchase land with a view to the formation of it, and state at once that they were

(a) 4 Russ. 652.

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the owners of such land, and propose to sell it at a price fixed, for the purposes of the company about to be formed, the transaction, so far as the public are concerned, commencing with that statement, might not fall within the principle of *Hichens v. Congreve*. A party may have a clear right to say—"I begin the transaction at this time; I have purchased land, no matter how or from whom, or at what price; I am willing to sell it at a certain price for a given purpose." It is not necessary that I should determine the effect of the transactions that are stated to have occurred in the present case. I

make these observation only, that I may not be supposed,
 [*490] from any thing which fell from me during the "argument, to ascertain the slightest hesitation with regard to the application, in a proper case, of the principles I have referred to. For the present purpose, I shall assume that a case is stated, entitling the company, as matters now stand, to complain of the transactions mentioned in the bill.

The Victoria Park Company is an incorporated body and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the *Attorney-General v. Wilson* (a), (without going further), it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the *Attorney General v. Wilson* in this,—that instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of,—the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to

(a) Cr. & Ph. 1.

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assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this ; and the only question can be, whether the facts alleged [*491] in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.

The demurrers are,—first, of three of the directors of the company, who are also alleged to have sold lands to the corporation under the circumstances charged ; secondly, of *Bealey*, also a director, alleged to have made himself amenable to the jurisdiction of the Court to remedy the alleged injuries, though he was not a seller of land ; thirdly, of *Denison*, a seller of land, in like manner alleged to be implicated in the frauds charged, though he was not a director ; fourthly, of Mr. *Bunting*, the solicitor, and Mr. *Lane*, the architect of the company. These gentlemen are neither directors nor sellers of land, but all the frauds are alleged to have been committed with their privity, and they also are in this manner sought to be implicated in them. The most convenient course will be, to consider the demurrer of the three against whom the strongest case is stated ; and the consideration of that case will apply to the whole.

The first objection taken in the argument for the Defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was too much broadly stated on the part of the Defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships ; and in cases which may easily be suggested, it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, *inter se*, because, in order to make their common objects more attainable, the crown or the legis-

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lature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord *Cottenham* in *Wallworth v. Holt* (a), and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from,—rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill entitling the Plaintiffs to sue in their private characters. [His honor stated the substance of the act, sections 1, 38, 49, 48, 46, 47, 48, 49, 67, 70, 114, and 129 (b).] The result of these clauses is, that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any [*493] purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.

Now, that my opinion upon this may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might *prima facie* entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to

(a) 4 Myl. & Cr. 635. See also 17 Ves. 320, per Lord *Eldon*.

(b) *Supra*, p. 464, n., et seq.

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adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of *Preston v. The Grand Collier Dock Company* (a).

On the first point, it is only necessary to refer to the clauses of the act to show, that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by cestui que trusts, complaining of a fraud committed or alleged to have been [494] committed by persons in a fiduciary character. The complaint is, that those trustees have sold land to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is, that although the act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat

(a) 11 Sim. 327, S. C.; 2 Railway Cases, 335.

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the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shown either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to [*495] set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights.

[His Honor recapitulated the history and present situation of the company, as it appeared upon the bill.]

I pause here to examine the difficulty which is supposed by the bill to oppose itself to the body of proprietors assembling and acting at an extraordinary general meeting. The 48th section of the act says, that a certain number of proprietors may call such a meeting by means of a notice to be addressed to the board of directors, and left with the clerk or secretary, at the principal office of the company, one month before the time of meeting, or the board is not bound to notice it. The bill says that there is no board of directors properly constituted,—no clerk,—no principal office of the company,—no power of electing more directors,—and that the appointment of the clerk being in the board of directors, no clerk can in fact now be appointed. I am certainly not prepared to go the whole length of the Plaintiff's argument founded upon the 48th section. I admit that the month required would probably be considered imperative;

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but is not the mode of service directory only? Could the board of directors *de facto*, for the time being, by neglecting to appoint a clerk or have a principal office, deprive the superior body, the body of proprietors, of the power which the act gives that body over the board of directors? Would not a notice in substance,—a notice for example such as the 129th section provides [*496] for in other cases, be a sufficient notice? Is not the particular form of notice which is pointed out by the 48th section a form of notice given only for the convenience of the proprietors and directors? And if an impediment should exist, and, a fortiori, if that impediment should exist by the misconduct of the board of directors, it would be difficult to contend with success that the powers of the corporation are to be paralyzed, because there is no clerk on whom service can be made. I require more cogent arguments than I have yet heard to satisfy me that the mode of service prescribed by the 48th section, if that were the only point in the case, is more than directory. The like observations will apply to the place of service; but as to that, I think the case is relieved from difficulty by the fact that the business of the company is stated to be principally conducted at the office of the solicitor, for I am not aware that there is anything in the statute which attaches any peculiar character to the spot designated as the principal office. In substance, the board of directors *de facto*, whether qualified or not, carry on the business of the company at a given place, and under this act of Parliament it is manifest that service at that place would be deemed good service on the company.

If that difficulty were removed, and the Plaintiff should say, that by the death or bankruptcy of directors, and the carelessness of proprietors, (for that term must be added), the governing body has lost its power to act, I should repeat the inquiries I have before suggested, and ask whether, in such a case also, the 48th section is not directory, so far as it appears to require the refusal or neglect of the board of directors to call a general meeting, before the proprietors can by advertisement call such a meeting for themselves. Adverting to the undoubted powers conferred upon the proprietors,

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to hold special general meetings without the consent and
[*497] *against the will of the board of directors, and the permanent powers which the body of proprietors must of necessity have, I am yet to be persuaded that the existence of this corporation (for without a lawful governing body it cannot usefully or practically continue) can be dependant upon the accidents which at any given moment may reduce the number of directors below three. The board of directors, as I have already observed, have no power to put a veto upon the will of any ten proprietors who may desire to call a special general meeting; and if ten proprietors cannot be found, who are willing to call a special general meeting, the Plaintiffs can scarcely contend that this suit can be sustained. At all events, what is there to prevent the corporators from suing in the name of the corporation? It cannot be contended that the body of proprietors have not sufficient interest in these questions to institute a suit in the name of the corporation. The latter observations, I am aware, are little more than another mode of putting the former questions which I have suggested. I am strongly inclined to think, if it were necessary to decide these points, it could not be successfully contended that the clauses of the act of Parliament which are referred to are anything more than directory, if it be, indeed, impossible from accident to pursue the form directed by the act. I attribute to the proprietors no power which the act does not give them: they have the power, without the consent and against the will of the directors, of calling a meeting, and of controlling their acts; and if by any inevitable accident the prescribed form of calling a meeting should become impracticable, there is still a mode of calling it, which, upon the general principles that govern the powers of corporations, I think would be held to be sufficient for the purpose.

It is not, however, upon such considerations that I
[*498] *shall decide this case. The view of the case which has appeared to me conclusive, is, that the existence of a board of directors *de facto* is sufficiently apparent upon the statements in the bill. The bankruptcy of *Westhead*, the last of the three directors who became bankrupt, took place on the 2nd of

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January, 1840: the bill alleges that he thereupon ceased to be *qualified* to act as director, and his office became vacated; but it does not say that he ceased to *act* as a director; nor, although it is said that thenceforward there was no board "properly constituted," it is alleged that there was no board *de facto* exercising the functions of directors. These, and several other statements of the bill, are pregnant with the admission of the existence of a board *de facto*. By whom was the company governed, and its affairs conducted, between the time of *Westhead's* bankruptcy, and that of the filing of the bill, in October, 1842? What directors or managers of the business of the company have lent their sanction to the mortgages, and other transactions complained of, as having taken place since January 1840, and by which the corporation is said or supposed to be, at least to some extent, legally bound? Whatever the bill may say of the *illegal* constitution of the board of directors, because the individual directors are not duly qualified, it does not anywhere suggest that there has not been during the whole period, and that there was not when the bill was filed, a board of directors *de facto*, acting in and carrying on the affairs of the corporation, and whose acting must have been acquiesced in by the body of proprietors; at least, ever since the illegal constitution of the board of directors became known, and the acts in question were discovered. But if there has been or is a board *de facto*, their acts may be valid, although the persons so acting may not have been duly qualified. The 114th section (a) of the act provides [*499] that all acts, deeds, and things, done or executed at any meeting of the directors, by any person acting as a director of the said company, shall, notwithstanding it may afterwards be discovered that there was some defect or error in the appointment of such director, or that such director was disqualified, or, being an interim director, was disapproved of by an annual general meeting of proprietors, be as if such person had been duly appointed and was qualified to be a director." The foundation upon which I consider the Plaintiffs can alone have a right to sue in the form of this bill must wholly fail, if there has been a governing body of directors

(a) Not stated in the bill.

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de facto. There is no longer the impediment to convening a meeting of proprietors, who by their vote might direct proceedings like the present to be taken in the name of the corporation, or of a treasurer of the corporation, (if that were necessary); or who, by rejecting such a proposal, would, in effect, decide that the corporation was not aggrieved by the transactions in question. Now, since the 2nd of January, 1840, there must have been three annual general meetings of the company held in July in every year, according to the provisions of the act. These annual general meetings can only be regularly called by the board of directors. The bill does not suggest that the requisitions have not been complied with in this respect, either by omitting to call the meeting, or by calling it informally: but the bill, on the contrary, avers that several general meetings, and extraordinary general meetings, and other meetings of the shareholders of the company, were duly convened and held at divers times between the time when the company was established and the year 1841; including, therefore, in this period of formality of proceeding, as well as of capacity in constitution, an entire year after *Westhead's* bankruptcy.

[*500] *Another statement of the bill leading to the same inference,—the existence of an acting board,—is that which avers, that since the year 1839, down, in fact, to the time of filing the bill, that is, during these three years, the company has had no office of its own, but the affairs of the company have been principally conducted at the office of Mr. *Bunting*. Now this, as I must read it, is a direct admission that the affairs of the company have been carried on by some persons. By whom then have they been carried on? The statute makes the board of directors the body by whom alone those affairs are to be ordered and conducted. There is no other person or set of persons empowered by the act to conduct the affairs of the company; and there is no allegation in the bill that any persons, other than the board of directors originally appointed, have taken upon themselves that business. In the absence of any special allegation to the contrary, I am bound to assume that the affairs of the company have been carried on by the

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body in whom alone the powers of that purpose were vested by the act, viz. a board of directors.

Again, the bill alleges, that, since the bankruptcy of *Westhead*, the bankrupts have joined in executing the conveyances of the property of the company to mortgagees. It could only have been in the character of directors that they could confer any title by the conveyance; in that character the mortgagees would have required them to be parties, and it is in that character that I must assume they executed the deeds.

If the case rested here, I must of necessity assume the existence of a board of directors, and in the absence of any allegation that the board *de facto*, in whose acting the company must, upon this bill, be taken to have acquiesced, have been applied to and have refused to appoint "a clerk and treasurer, (if [*501] that be necessary), or take such other steps as may be necessary for calling a special general meeting, or had refused to call such special general meeting, the bill does not exclude every case which the pleader was bound to exclude in order to justify a suit on behalf of a corporation, in a form which assumes its practical dissolution. But the bill goes on to shew that special general meetings have been holden since January, 1840. The bill, as I have before observed, states that several general meetings, and extraordinary general meetings, have been holden between the establishment of the company and the year 1841, not excluding the year 1840, which was during *Westhead's* disqualification,—“and that at such meetings false and delusive statements, respecting the circumstances and prospects of the company, were made by the said directors of the company to the proprietors who attended such meetings, and the truth of the several fraudulent and improper acts and proceedings herein complained of was not disclosed;” and the bill specifies some meetings in particular. Against the pleader, I must intend, that some such meetings may have been holden at a time when there was no board properly constituted, treasurer or principal office of the company, save such as appear by the bill to have existed; and if that were so, the whole of the case of the Plaintiffs, founded on the impracticability of calling a special general meeting, fails.

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Assuming then, as I am bound to do, the existence, for some time at least, of a state of things in which the company was governed by a board of directors de facto, some of the members of which were individually disqualified, and in which, notwithstanding the want of a clerk, treasurer, or office, the powers of the proprietors were called into exercise at general meetings, the question is, when did that state of things cease to exist, so as to justify the extraordinary proceeding of the Plaintiffs by this suit? The Plaintiffs have not stated by their bill any facts to shew that such was not the actual state of things at the time their bill was filed, and, in the absence of any statement to the contrary, I must intend that it was so.

The case of *Preston v. The Grand Collier Dock Company* was referred to as an example of a suit in the present form; but there the circumstances were in no respect parallel with the present: the object of that suit was to decide the rights or liabilities of one class of the members of the corporation against another, in respect of a matter in which the corporation itself had no power to vary the situation of either.

I have applied strictly the rule of making every intendment against the pleader in this case,—that is, of intending every thing to have been lawful and consistent with the constitution of the company, which is not expressly shewn on the bill to have been unlawful or inconsistent with that constitution. And I am bound to make this intendment, not only on the general rule, but also on the rules of pleading which require a plaintiff to frame his case so distinctly and unambiguously, that the Defendant may not be embarrassed in determining on the form which his defence should assume. *Attorney-General v. Corporation of Norwich* (a). The bill, I cannot but observe, is framed with great care, and with more than ordinary professional skill and knowledge; but the averments do not exclude that which, prima facie, must be taken to have been the case, that during the years 1840, 1841, and 1842, there was a governing body,—that by such body the business of the company was carried

(a) 2 Myl. & Cr. 406.

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on,—that there was no insurmountable impediment to the exercise of the powers of the proprietors assembled in [*503] general meetings to control the affairs of the company, and that such general meetings were actually held. The continued existence of a board de facto is not merely not excluded by the averments, but the statements in the bill of the acts which have been done suppose, and even require, the existence of such a board. Now if the Plaintiff had alleged that there had been no board of directors de facto, and had on that ground impeached the transactions complained of, the Defendants might have met the case by plea, and thereby have defended themselves from answering the bill. If it should be said that the Defendants might now have pleaded, that there was a board of directors de facto, the answer is, that they might then have been told that the fact sufficiently appeared upon the bill, and therefore they ought to have demurred. Uncertainty is a defect in pleading, of which advantage may be taken by demurrer. If I were to overrule these demurrers, I might be depriving the Defendants of the power of so protecting themselves; and that because the Plaintiff has not chosen, with due precision, to put forward that fact, which, if alleged, might have been met by plea, but which, not being so alleged, leaves the bill open to demurrer.

I must further observe, that although the bill does, with great caution, attempt to meet every case which, it was supposed, might have been fatal to it upon demurrer, yet it is by allegations of the most general kind, and many of which cannot by possibility be true. It alleges the recent discovery of the acts complained of, but it gives no allegation whatsoever for the purpose of telling when or how such discovery was made, or what led to it. I am bound to give the Plaintiff, on a general demurrer, the benefit of the allegation that the matters complained of have been recently discovered, whatever the term "recently discovered" may [*504] mean; but when I look into the schedule to the act I find that many of those matters must have been known at a very early period in the history of the company. I find also provisions of the act requiring that books shall be kept in which all transactions shall

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be fully and fairly stated ; and I do not find in the bill anything like a precise allegation that the production of those books would not have given the information, or that there have not been means of seeing those books at least at some time since 1835, or since the transactions in question took place, so that, in point of fact, many of the transactions might and may have been sooner known. These are observations upon which I do not found my judgment, but which I use as explaining why it is I have felt bound in favour of the defendants to construe the bill with strictness.

The second point which relates to the charges and incumbrances alleged to have been illegally made on the property of the company is open to the reasoning which I have applied to the first point, upon the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill ; for why should this anomalous form of suit be resorted to, if the powers of the corporation may be called into exercise ? But this part of the case is of greater difficulty upon the merits. I follow, with entire assent, the opinion expressed by the *Vice-Chancellor* in *Preston v. The Grand Collier Dock Company*, that, if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not defendants to the [*505] bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation, from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill shewed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different consid-

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erations arise in a case like the present, in which the only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question,—the question of confirmation or avoidance,—cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in [*506] the same predicament as that which relates to the other subject of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point, these demurrers must be allowed.

WOODWARD v. CONEBEER.

1843: 27th, and 28th April. 11th, and 25th May.

A Defendant, in custody for not answering, and brought up to have the bill taken pro confesso against him, within the time limited by the Statute, 1 W. 4, c. 36, s. 15, r. 13, asked for time to put in his answer, and three weeks was thereupon given him with liberty to apply for his discharge upon having answered. The time fixed by the same rule of the Statute for retaining a Defendant in custody, without obtaining the order for taking the bill pro confesso, expired during the three weeks: no answer was put in:—*Held*, that in such circumstances the Defendant was not en-

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titled to his discharge under the 13th rule of the Statute, but was remitted to the situation he would have been in if that provision of the Statute had not existed.

THE process against the Defendant, up to the time that he was committed to the Fleet, *cum causis*, is stated in a former report of proceedings in this cause, (vol. 1, p. 297). On the 9th of May, 1842, the Defendant was brought up by habeas corpus, in order that the bill might be taken *pro confesso* against him: the Defendant then asked for time to put in his answer; the Plaintiff did not oppose the Defendant's application, and three weeks' time was given (*a*).

No answer was, however, put in.

[507] Mr. *Zee* moved that the Defendant might be discharged from custody, under the provisions of the statute 1 Will. 4, c. 36, s. 15, rule 13, on the ground that the Plaintiff had

(*a*) The order of the 9th of May, 1842, was as follows:—"Whereas by an order dated the 21st day of February, 1842, it was ordered that the Defendant R. Conebeer should be committed to her Majesty's prison of the Fleet, for his contempt in not putting in his own and his wife's answer to the Plaintiff's bill; and that it should be referred to the Master of this Court in rotation to inquire and state to the Court whether the said Defendant was unable by reason of his poverty to employ a solicitor to put in his own and his wife's answer to the Plaintiff's bill; and after the said Master should have made his report, such further order should be made as should be just: and whereas Mr. *Senior*, the Master, &c., by his report bearing date the 23rd day of March, 1842, certified that he found that the said Defendant R. Conebeer was unable by reason of his poverty to employ a solicitor to put in his own and his said wife's answer to the Plaintiff's said bill and the said Defendant being this day brought up to the bar of this Court by virtue of a habeas corpus *cum causis* directed to the warden of the Fleet to answer his contempt in not putting in his own and his said wife's answer and in order that the Plaintiff's bill might be taken *pro confesso* against the said Defendant: it is, upon the motion of Mr. *Baily*, of counsel for the Plaintiff, ordered, that the said Defendant R. Conebeer be remanded to her Majesty's prison of the Fleet; but the said Defendant now desiring to put in his own and his said wife's answer to the Plaintiff's bill, and praying time for that purpose, and it appearing, that by an order made in this cause by the Right Hon. the Master of the Rolls, bearing date the 15th day of March, 1842, the said Defendant was admitted to defend this in forma pauperis, and Samuel Wells, Esq., and Frances Versey, Esq., were appointed his counsel and six clerk for that purpose; it is further ordered, that the said Defendant do have three weeks' time to put in his own and his wife's answer to the Plaintiff's said bill; and it is ordered, that upon the said Defendant's putting in his own and his said wife's answer to the Plaintiff's bill, he be at liberty to apply to this Court to be discharged from his said contempt.

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not obtained an order to take the bill pro confesso within the time limited by that rule, namely, within the six weeks following the expiration of two calendar months from the time of the attachment, for not answering. *Collins v. Collyer* (a). The period of six weeks had expired on the 12th of May, 1842.

Mr. *Baily*, for the Plaintiff, said that the prisoner had been brought up within the time specified by the statute, in order that the bill might be taken pro confesso against him; that at his own request three weeks' time had been given him to put in an answer, and the effect of that order had been to carry the Defendant over the time within which it was possible to obtain the order for taking the bill pro confesso. It was *therefore by no de- [*508] fault of the Plaintiff that the order had not been obtained within the prescribed time, but purely from indulgence to the Defendant.

THE VICE-CHANCELLOR said, that so long as the order of the 9th of May, 1842, stood, giving the Defendant time to answer, and then giving him liberty to apply, he could not be within the provision of the statute referred to; and he refused the motion.

Mr. *Teed* moved that the order of the 9th of May, 1842, might be discharged with costs, and that the Defendant might be discharged out of custody as to this suit, without paying any costs of the contempt. He insisted that the order of May ought not to have been made: the Defendant was absolutely entitled to his discharge, under the terms of the act, at the expiration of the six weeks, and it was not competent to the Defendant himself to waive that right. *Haynes v. Ball* (b), Lord *Langdale*, referring to *Greening v. Greening* (c), said, "If a defendant has once a right to his discharge, he has neither power nor capacity to waive his right." If the Plaintiff desired to avail himself of the benefit of the order of the 9th of May, it was his duty to get in the defendant's answer,

(a) Cr. & Ph. 262.

(b) 4 Beav. 101.

(c) 1 Id. 121.

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and thereby enable him to apply for his discharge ; or otherwise the Defendant being in prison, and therefore incapable of proceeding actively with the necessary steps, might be retained in custody an indefinite period.

Mr. *Baily* contra.

[*509] *VICE-CHANCELLOR :—

The act under which the present question has been raised supposes the existence of two cases : first, where the simple order to take the bill pro confesso will not answer the purposes of justice, because the Plaintiff requires some discovery from the Defendant ; and secondly, where the Plaintiff, requiring no discovery, is able to say,—“ admit what the bill alleges, and upon that I shall be able to obtain the relief which I seek.” In the former case the Court has power to remand the prisoner until he has given the necessary discovery ; in the latter order to take the bill pro confesso is alone required. The Plaintiff in the present case, not requiring any answer was under the necessity of bringing up the Defendant at an earlier time than at which he was actually brought up. The Defendant then desired an opportunity of making his defence. Whether the Plaintiff could then have insisted that the order for taking the bill pro confesso should be made, I do not now inquire ; but the Defendant expressing a desire to put in his answer, i. e. to make his own defence, asked for three weeks’ time to enable him to do so, and that time was accordingly given him. At the expiration of three weeks thus obtained, it was no longer open to the Plaintiff to pursue his former course, for it had become too late to take the bill pro confesso, at least under the statute. The defendant having thus bought off the right of the Plaintiff to have the bill taken pro confesso, upon condition of obtaining three weeks’ time to make his defence, now contends that the act of Parliament precluded him from making that bargain for his own benefit, and that the Court is now to give him his discharge without being able to restore the Plaintiff the right of having the bill taken pro confesso under the statute. It

[*510] would be very extraordinary if the Defendant *could deal with the Plaintiff in the manner which this motion sup-

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poses. In the cases cited where the Court has discharged orders under which parties have been continued in custody, such orders were made at a time when the party was entitled to his discharge when the order was made, and being made at that time the orders were held to be erroneous. At the time the order in question was made, the right of the Defendant to his discharge had not accrued. The remark of the Master of the Rolls, that the party cannot waive his right to discharge from custody, must refer to cases such as I have mentioned,—where that right is already perfect. There are many cases in which a party may, by a very trivial act, alter or vary his rights in the conduct of a cause. I give no opinion, however, on what may be the effect of mere waiver. I have no doubt that a party to a cause may enter into a contract for his own benefit, although by one of the terms of that contract he should be placed in such a position as to lose the right to be discharged from custody which he otherwise would have had. The Defendant in this case, by obtaining time to make his defence, and by that means precluding that course which the Plaintiff might have taken under the act, has remitted himself to the situation in which he would have been if these provisions of the act had never been passed.

If the Defendant were in any difficulty, it would be the consequence of his own election; but fortunately he is not under any substantial difficulty impeding his discharge: he has only to put in his answer. And although it is said that he has been delayed by the refusal of his wife to join in the answer, that difficulty is removed. the Plaintiff having now consented to take his answer alone.

Motion refused.

*PRICE v. WEBB

[*511]

1843: 2nd, 15th, and 22nd June. 13th July.

The omission by the Plaintiff to endorse an address for service on the writ, as directed by the 30th Order of the 26th of October, 1842, does not of necessity make the writ void; but the Court will, in the mean time, so deal with the proceedings

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which are under its control, by staying process or otherwise, as to give the party the benefit of the 20th Order.

Form of the order for liberty to enter a conditional appearance with the registrar since the 7th General Order, of the 26th of August, 1841.

THE Plaintiff, suing in person, endorsed upon the bill his name and place of residence, which was more than three miles from the record and writ clerks office; but he omitted to endorse upon the writ of subpoena to appear and answer an address for service, according to the directions contained in the Order XX. of the 26th of October, 1842 (a).

On the 25th of May, the Defendant obtained an order to enter a conditional appearance with the registrar. By the practice which existed before the general orders of the 26th of August, 1841, the Defendant was required to submit that the serjeant-at-arms should go against him if the subpoena were not set aside (b); but the Order VII. of August, 1841, having directed that no order should thereafter be made for the serjeant-at-arms to take the body of a Defendant to compel appearance, the order for liberty to enter the conditional appearance was made, upon the consent of the Defendant to submit to any process which the Court might direct to be issued against him for want of appearance, in case the subpoena should not be set aside for irregularity.

Mr. *Dunn*, for the Defendant, moved that the writ of subpoena might be set aside, as not being in conformity with the order.

Mr. *Tinney* and Mr. *Watson*, contra.

[*512] THE VICE-CHANCELLOR said that the omission to endorse on the writ the address for service did not make the writ itself irregular or void; but the Court might withhold from the Plaintiff the benefit of the subpoena, by preventing him from taking any ulterior proceeding founded upon it, until the place of service had been properly endorsed; for until then, the Defendant had not such convenient means of service as the Court, by the 20th

(a) See *Beavan*, Ord. Can. 214. (b) See 1 Dan. Ch. Pr. 667; 2 Id. 13, et seq.

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Order, had provided that he should have.

Motion refused, without costs.

The subpoena to appear and answer was served on the 20th of May. On the 29th of May, the Defendant served the Plaintiff personally, under the Order XXI. of the 26th of October, 1842, with the order for liberty to enter an appearance with the registrar, together with a copy of the certificate of the registrar that the appearance had been entered accordingly; and at the same time the Defendant gave notice of the motion to quash the writ as above reported. On the 30th of May, the Plaintiff obtained a writ of attachment for want of appearance, and also the common injunction to restrain proceedings at law.

Mr. *Dunn* moved to set aside the attachment and discharge the order for the injunction, insisting that the Defendant was not bound to appear until the Plaintiff had given an address for service within the three miles; but the Defendant had in fact appeared before the attachment, and that therefore the Plaintiff was not, on the 30th of May, in a condition to obtain either the attachment or the injunction. *Mackreth v. Nicholson (a)*.

“Mr *Tinney*, for the Plaintiff, contended that it was [*513] sufficient that the address for service was endorsed on the bill,—that the writs referred to in the 20th Order were writs which were formerly issued out of the Six Clerks Office, and which by the statute 5 & 6 Vict. c. 103, and the Order IV. of the 26th of October, 1842, were placed under the management of, and now sealed by the clerk of records and writs; but that this did not apply to the subpoena, a writ which was still issued from the subpoena office (b); that the appearance entered with the registrar was not such an appearance as would preclude an attachment. It merely enabled the Defendant to be heard on the question of irregularity, but it was no foundation for any proceeding by the Plaintiff, and did not stand in the way of the ordinary process for enforcing appear-

(a) 19 Ves. 367
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(b) See order I. of the 21st December, 1843.
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1843.—Price v. Webb.

ance in the regular manner : that even supposing the appearance to be sufficient to preclude an attachment, the Defendant had not duly served the Plaintiff with notice of it, for he had merely served it personally, and not at the address for service endorsed upon the bill.

[THE VICE-CHANCELLOR said, that the personal service was clearly regular, under the 21st Order of the 26th of October, 1842, until the proper address for service was given as the 20th Order required.]

Mr. *Dunn*, in reply, said that the Defendant, not having appeared, had no means of seeing the bill, or of knowing what address was endorsed upon it.

VICE-CHANCELLOR :—

The 20th Order of October, 1842, which directs that [*514] an address shall be endorsed on the "proceedings in certain cases, certainly does not in terms require that the subpoena should be held void and set aside, in case the address for service is omitted. The order would be satisfied by the writing or endorsement of the address after the writ issued, and before service ; in fact it might frequently be necessary to make or alter the endorsement after the subpoena had issued. If, indeed, in this or any other case, it were necessary to go the length of setting aside the subpoena, in order to secure to the Defendant the benefit of the 20th order, I should probably feel bound to hold it void ; but this is not necessary to insure to the Defendant the benefit of the order ; for the proceedings being under the control of the Court, the Court may in ordinary cases (and clearly it may in this case) do complete justice by staying process until the order be complied with.

I therefore refused the former motion, but without costs.

At the time of making that order my attention was not called to the terms of the order of the 25th of May, for entering the conditional appearance, and the Defendant appears to have overlooked the position in which he was placed ; for the effect of that order

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strictly taken, was to waive every objection to the subpoena unless it were set aside. The Defendant, however, has now moved to set aside the attachment founded upon the subpoena and to dissolve the injunction restraining proceedings at law. In strictness, it is obvious that I should be violating no rule of practice if I held the Defendant bound by all the steps which have been taken in the cause; but it would be harsh to do so where two points of practice, both new and of the first impression, have arisen, and may well excuse his mistake. I may, I think, in such a case, reasonably construe the pending motion as an application, upon the ground of mistake, to set aside the attachment and dissolve the injunction, notwithstanding the Order of the 25th of May. If [*515] I do not give the Defendant the benefit of this construction of his application, he may be deprived of the protection of the 20th Order of October, which provides him with a mode and place of service, of which he is deprived by the abolition of the Six Clerks Office; and I cannot measure the possible mischief which that might occasion. On the other hand, the Plaintiff, upon the merits, is clearly in default.

In this view of the case I have rejected the argument for the Plaintiff, that the subpoena is not a writ within the 20th Order. The words of the order are large enough to comprehend it; it was intended to be included in its provisions, and the good sense of the case plainly requires that it should be so included.

THE Defendant undertaking to enter an appearance forthwith, and not to issue execution at law without the leave of the Court, discharge the attachment, and dissolve the injunction without costs.

An order for leave to amend not served, does not prevent the Defendant from demurring to the bill.

An order for leave to amend operates from the time of service only, and therefore an intermediate step taken by the Defendant, after the order is made, and before it is saved, is regular.

On the 22nd of June the Defendant entered his appearance, and on the 28th of June filed a demurrer to the whole bill. The Plain,

1843.—*M'Gregor v. Topham.*

tiff obtained an order to amend his bill before, but did not serve it until after, the demurrer was filed. The Plaintiff did not set down the demurrer within the twelve days specified by the Order XXXIV. of the 26th of August, 1841.

Mr. *Roupell*, for the Defendant, moved that he might be at liberty to issue execution on the judgment at law. The Plaintiff must, under the 34th Order, be held to have submitted to the demurrer.

[*516] *Mr. *Tinney*, for the Plaintiff, said that the only question was whether the existence of the order to amend, not served, precluded the Defendant from demurring.

Lorimer v. Lorimer (a) was cited, where Lord *Eldon* said he had no doubt there were many cases, not cases of contempt, where, if an order has been pronounced upon motion of course but not served, and some intermediate step is taken by the other party, that step will be good (b).

THE VICE-CHANCELLOR said that the order for leave to amend was one of those which operated from the time of service only; it did not render any step irregular which the Defendant might take before he was aware of the order. The rule of the Court required that the demurrer should be filed within a limited time, and the Defendant was not precluded from filing it by the existence of the order for leave to amend, which had not been served upon him.

M'GREGOR v. TOPHAM.

1843: 11th May.

Where the Defendant obtains a commission to examine witnesses under the 17th (amended) Order of April, 1838, the commission must be made returnable the first return of the second term next following the date of the order for such commission.

THE Plaintiff filed his replication on the 6th of March, without

(a) 1 J. & W. 284.

(b) 1 Dan. Ch. Pr. 541.

1843.—*M^cGregor v. Topham.*

having been served with a notice to dismiss the bill for want of prosecution; and he afterwards served a subpoena to join, within three weeks after filing the replication, but did not obtain an order for a commission to examine witnesses. The Defendant then obtained an order of course at the Rolls for a commission to examine witnesses. The commission was made returnable on the first return of Trinity Term, being the latest date of the return to which the Plaintiff would have been entitled if he had applied for a commission; the construction given in the office to [*517] that part of the Order XVII. of 1828, (amended 1831), which directs, that the commission to be obtained by the Defendant in such a case shall be "returnable at the like period," as the Plaintiff is entitled to pursuant to that order.

Mr. *Smythe*, for the Defendant, moved, without notice, that the commission might be made returnable on the first return of Michaelmas Term, being the second term next following the date of the order for the commission. It had been decided, contrary to the previous practice of the office, that where [the Plaintiff required a commission the return should be reckoned from the date of his order for the commission, and not from the date of the replication: *Williams v. M^cDonnell* (a). Where the Plaintiff, therefore, did not obtain an order, and the Defendant required a commission, the only reasonable construction of the words, "returnable at the like period as the Plaintiff is entitled to," was to count the return of the Defendant's commission from the date of the Defendant's order, in the same manner as the return of the Plaintiff's commission, had he required it, would have been counted from the date of the Plaintiff's order. The construction adopted in the office in fixing the return in Trinity Term was not consistent with the decision in *Williams v. M^cDonnell* (a). According to the construction insisted on by the Defendant, the commission would be returnable on the first return of Michaelmas Term: and it was reasonable that the Defendant should have the same time after the date of his order for the return of his commission as the Plaintiff would have been entitled to.

THE VICE-CHANCELLOR made the Order.

(a) 9 Sim. 401.

 1843.—Attorney-General v. Ray.

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*ATTORNEY-GENERAL v. RAY.

1843: 27th April.

Where depositions, taken in a suit to perpetuate testimony, are required to be used in a trial at law, not under the control of the Court, the order is, that the depositions be published, and that the officer attend with and produce to the Court of law the record of the whole proceedings, and that the parties may make such use of the same as by law they can.

In the year 1836, on the expiration of a lease from the Crown to *Ray* and another, Mr. *Richardson*, a surveyor, was appointed on behalf of the Crown, to report whether the property was left in the state in which the lessees had covenanted to leave it. In Trinity Term, 1838, an information, in the nature of an action of covenant was brought by the Crown against *Ray*, to which action he pleaded in May following. The replication was not filed until Trinity Term, 1840: notice of trial was given in May, 1841, and at the same time notice of a motion to examine *Richardson* de bene esse, which motion the Crown afterwards abandoned. In June, 1841, the present bill was filed to perpetuate the testimony of *Richardson*, on the ground of his infirm health, and the witness was accordingly examined. In January, 1843, *Richardson* died.

Mr. *George Maule*, for the *Attorney-General*, moved, that the depositions might be published, and that the officer might be ordered to attend with the depositions at the trial at law: *Andrews v. Palmer* (a); *Jervis v. White* (b).

Mr. *G. L. Russell*, for the Defendant, argued, that, after the very dilatory manner in which the proceedings at law had been carried on, the order ought not to be made; *Angell v. Angell* (c), *East India Company v. Naish* (d), *Duke of Dorset v. Girdler* (e), *Dew v. Clark* (g).

(a) 1 V. & B. 21.

(c) Per Sir *J. Leach*, 1 S. & St. 89.

(e) Prec. Cha. 581.

(b) 3 Ves. 313.

(d) Bunb. 320.

(g) 1 S. & S. 108.

 1843.—Attorney-General v. Ray.

*If the Court is bound to give any assistance after so [*519] much delay, it will not be by directing publication of the depositions,—for that might be regarded at law as a decision of this Court on the admissibility of the evidence: the order will be confined to simply directing that the whole record shall be taken down. The order must not be so framed as to prejudice any question as to the evidence which might arise at law: *Duke Hamilton v. Meynal* (a), *Brown v. Thornton* (b).

The VICE-CHANCELLOR said, that this Court could not, in simply exercising the necessary jurisdiction over its records, in a suit merely to perpetuate testimony, be supposed to give any opinion of the value or admissibility of the evidence; the depositions should be published and the whole record produced at the trial (c).

THIS Court doth order, that the depositions in chief of *J. Richardson*, taken in this cause, be forthwith published, and it is ordered that the proper officer and officers do attend with and produce to her Majesty's Court of Exchequer, at the sittings after this present Easter Term to be holden at Westminster Hall, in the county of *Middlesex*, or on such day and time as shall be appointed by the said Court of Exchequer, for the trial of a certain information at law depending in her Majesty's said Court of Exchequer, wherein her Majesty's said *Attorney General* is informant, and *Henry Bellward Ray*, and &c., as executors, &c., are defendants, the original record of the whole of the proceedings filed in this Court in this suit, and also the original interrogatories upon which the said *J. Richardson* was examined in chief as aforesaid, by one of the examiners of this Court, and the original depositions of the said *J. Richardson*, so taken as aforesaid by the said examiner, and either of the parties is to be at liberty to make such use of the said proceeding, interrogatories, and depositions on the said trial as by law they can.

Reg. Lib. A. 1842, fol. 1102.

(a) 2 Dick. 788. *S. C.*, *Anon.* 2 Ves. 497.

(b) 2 Myl. & Cr. 248; per Lord Cottenham.

(c) The form of order which follows, was suggested by the registrar (*Mr. Monro*) as having been adopted in some former precedents, found in the office.

1843.—Rowland v. Sturgis.

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BARRETT v. BUCK.

1843 : 27th April.

Order for preliminary inquiries, under the 5th Order of the 9th of May, 1839, refused where some of the Defendants suggested to be out of the jurisdiction had not appeared.

MOTION for preliminary inquiries under the Order V. of the 9th of May, 1839. The bill prayed the subpoena against two of the Defendants, when they should come within the jurisdiction: they had not appeared.

The VICE-CHANCELLOR said, that the circumstances of the Defendants being out of the jurisdiction, supposing that to be the fact, did not bring the case within the order, where they had not appeared to the bill; and he refused the motion (a).

Mr. *G. L. Russell* for the Plaintiff, and Mr. *J. Parker*, for the Defendants who had appeared.

ROWLAND v. STURGIS.

12th June :

Instruments neither admitted nor denied may be proved *viva voce*, although the cause is heard upon the bill and answer, without replication.

A BILL of foreclosure against the assignee of the insolvent mortgagor. The answer did not dispute the existence of the mortgage deed, but did not admit it. The Plaintiff set the cause down upon the bill and answer, without filing any replication. At the hearing, the Plaintiff proved the mortgage-deed by affidavit, under the Order XLIII. of August, 1841, admitting evidence by affidavit, instead of *viva voce*.

Mr. *Tinney* and Mr. *T. Sydenham Clarke* cited *Practical Reg-*

(a) See *Meinertzhagen v. Davis*, 10 Sim. 289.

1843.—Holloway v. Clarkson.

ister (W). 219, and the case of *Fielder v. Cage*, (a), there cited, and 2 Dan. Chan. Pr., p. 441, to shew that the deed under which the Plaintiff claimed might be proved viva voce, notwithstanding he had not replied.

Mr. *Bagshawe*, and Mr. *Follett*, for the Defendants.

The deed was allowed to be proved.

HOLLOWAY v. CLARKSON.

[*521]

1842. 11th, 12th, and 14th July. 1843: 18th and 25th February, 4th, 11th, and 13th March.

Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint; and in default of appointment, to their respective executors, administrators, and assigns.

Held, that each of the legatees, whether married or unmarried women, were entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund.

JOHN HOLLOWAY, by his will, made in 1808, devised his real estate to trustees, and directed them out of the rents and profits to pay certain annuities to persons therein mentioned for their lives, and to accumulate the remainder; and after the decease of persons therein named, he directed his trustees to sell such real estate, and stand and be possessed of the monies to arise thereby, and the said accumulations, for the benefit of the following sixteen persons [naming them; seven being males, and nine females:] or the child or children of such of them as should be then dead, and to divide the same into so many equal parts, and appropriate and set apart so many of the said parts as should be equal in number to such of the sixteen persons so living as should be males, and stand possessed of the same respectively, in trust for such male persons respectively,

(a) Hil. T. 1797. Wy. Pr. Reg. 219.

1843.—Holloway v. Clarkson.

and his or their respective executors, administrators, and assigns, and appropriate and set apart for the portion of each of the said sixteen persons then living as should be females one of the remaining parts, and stand possessed of the same respectively, upon trust to pay the interest thereof to the sole and separate use of such female during her life, independently of any husband whom she had married or might marry, and without being in anywise subject to his debts, control, or engagements, and the receipts of her, or of such person or persons as she should from time to time appoint to receive the said interest and dividends, to be sufficient [*522] discharges for the same ; and after the decease of such female, upon and for such trusts, intents, and purposes as she should by deed or will appoint ; and in default of appointment, in trust for her executors, administrators, and assigns, as part of her personal estate : and there followed a clause, substituting in their parents' place the child or children of any of the sixteen legatees who should be dead at the said time of distribution. The testator died in 1821.

Of the nine female legatees, some were married and some single women at the date of the will ; some others had married, and some became widows before the death of the testator, and the death of the tenants for life ; and some were still married ; and some were single women and widows at the time of the death of the last tenant for life. A suit was then instituted to carry the trusts of the will into execution : the accounts were taken and the necessary inquiries made.

The cause came on for further directions. The fund was divided into fourteen parts, corresponding with the number of surviving or substituted legatees. The proper mode of disposing, by the order, of the shares of the several married and single women was discussed, and the parties desired to have the opinion of the Court with respect to their immediate power of dealing with their several shares.

Mr. *Girdlestone*, and Mr. *Sharpe*, appeared for different parties in the cause, and cited *Irwin v. Farrer* (a), *Reith v. Seymour* (b), and *Hoy v. Master* (c).

(a) 19 Ves. 86.

(b) 4 Russ. 263.

(c) 6 Sim. 568.

 1843.—Holloway v. Clarkson.

VICE-CHANCELLOR:—

The only regular order which I can make in the present position of the cause with reference to the "several" [*523] shares of the female legatees, whether married or unmarried, is, to direct that they be transferred to the separate account of the respective legatees, and that the dividends be paid to them for their lives, with liberty to apply. Any opinion which, at the request of the parties, I now express as to their powers of present disposition over their respective shares, is extra-judicial.

I do not think that there is much difficulty in deciding that the unmarried females may make an immediate disposition of their legacies; although, with regard to these, two questions arise upon the cases. The first is,—who are the persons to take by the description in the will, and for what estate and interest? And the second question is,—supposing the construction to be, that the persons intended are (as the words literally express) the executors, administrators, and assigns of the tenant for life,—what interest that gives to the tenant for life?

There is I think, no reasonable question in the present case as to the persons interested, or the interest they take. The disputed cases have generally arisen out of bequests to "representatives," "legal representatives," "personal representatives," and similar words, and not upon the words "executors, administrators, and assigns," which occur in the present case. In *Bulmer v. Jay* (a), and in some other cases, however, a question has arisen upon the effect of the words "executors and administrators." If I were compelled to give an opinion upon this part of the case, I should say, that the conclusion to be drawn from the more modern not unsupported by some of the earlier cases, is this,—that under a gift simply to "representatives," "legal representatives," [*524] "personal representatives," and to "executors and administrators," the hand to receive the money is that of the person constituted representative by the Ecclesiastical Courts; but that such person will, in the absence of a clear intention to the contrary, take the property as part of the estate of the

(a) 4 Sim. 48; S. C. 3 Myl. & K. 197.

 1843.—*Holloway v. Clarkson.*

person whose representative he is, and not beneficially: *Evans v. Charles* (a), *Ripley v. Waterworth* (b), *Wellman v. Bowring* (c), *Price v. Strange* (d), *Palin v. Hills* (e), *Hames v. Hames* (g), *Grafftey v. Humpage* (h), *Daniel v. Duckley* (i).

In the last case, Lord *Cottenham* strongly expressed his disapprobation of *Bulmer v. Jay*. However, the decision upon these cases have been by no means uniform. It has sometimes been decided that the persons intended were the representatives constituted by the Ecclesiastical Court; sometimes, that next of kin were intended; sometimes, that the representatives constituted by the Ecclesiastical Court took beneficially; and sometimes, that they took as representatives, and consequently as trustees for the estate of the party whose representatives they were. It will be sufficient to refer to the cases generally as they are collected in *Saberton v. Skeels* (k) and in *Grafftey v. Humpage*.

In considering the cases as they bear only upon the construction of the words (as words of discription), and upon the question of the interest which the legatee takes, it will be found convenient to distinguish the cases in which a legacy has been given to an individual; *and in case of his pre-deceasing the testator his representatives have been substituted for him, (as in *Bridge v. Abbot* (l), *Evans v. Charles*, and *Palin v. Hills*), from the cases of direct limitations to the representatives of an individual named not by way of substitution. In the former cases, the Courts appear to have treated the representatives as quasi purchasers, and have thereby excluded all argument upon the words as words of limitation.

The case now before me is not one of substitution; and supposing it to be decided (as I think it must be) that the words "executors, administrators, and assigns," mean what they naturally express,

(a) 1 Anst. 128. Per *Eyre* C. B.

(c) 1 Sim. & St. 24; 2 Russ. 374; 3 Sim. 328, *S. C.*

(d) 6 Madd. 159. Per Sir *J. Leach*.

(g) 2 Keen. 646.

(i) *Phillips*, 1; *S. C.* 11 Sim. 163.

(l) 3 Bro. C. C. 224.

(b) 7 Ves. 425.

(e) 1 Myl. & K. 470.

(h) 1 Beav. 46.

(k) 1 Russ. & Myl. 587.

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and that the executors, administrators, and assigns of the tenant for life will take in that character, and not beneficially, the question remains,—what power has the tenant for life over this quasi reversionary interest in his or her own personal estate, which, by the express terms in which it is given, is not to fall into the hands of the tenant for life after his or her death.

In deciding this question, the Court must lay wholly out of consideration the circumstance that a life estate is given in the first instance to the party to whose representatives the corpus is afterwards given. There is no analogy between real and personal estate in this particular: but still, assuming that the executor or administrator is to take, and that he takes as executor or administrator and as trustee only, it would seem to follow that the party whose estate is represented must have a disposing power over this as over other parts of his estate, notwithstanding the peculiar manner in which it becomes "part of his estate; and the language [*526] of Sir *William Grant* in *Anderson v. Dawson* (a), and of Lord *Langdale*, in *Graffey v. Humpage*, with other dicta to be met with, tend obviously to support the principle; although there are some reported cases of an opposite tendency, such as *Horsman v. Abbey* (b), *Wilson v. Mount*, (c) *Sanders v. Franks* (d).

I feel more difficulty with regard to the general power of the legatees who are married women. In the case of real estate, the estate for life of A., preceding mesne limitations, and followed by a remainder to the heirs of A., amount to a fee; but the principle does not extend to give by analogy an absolute interest in personal estate to a married woman on a limitation to her for life, with remainder to her executors, administrators, and assigns. The mere fact of taking a life estate in personal property has not had the effect of enlarging the operation of the gift in remainder to the same person. The married legatees may of course exercise the particular power which the will gives them: whether they can during their coverture in any other manner dispose of their shares in the fund, is a question which

(a) 15 Ves. 232.

(c) 2 Sim. & St. 493.

(b) 1 J. & W. 381.

(d) 2 Mad. 147.

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the authorities induce me to abstain from deciding until it is regularly before me (a).

Several of the married and single women presented their petitions, praying transfers of their respective shares of the fund. In one case the petitioner had executed a formal appointment: [*527] in all the other cases the petitioners prayed that the fund might be transferred or sold and the proceeds paid to them, but did not otherwise execute any appointment.

Mr. *Kenyon Parker*, Mr. *Anderdon*, and Mr. *Glasse*, for the several petitioners, submitted that they took an absolute interest in their shares, and that the demand made by the petition was a sufficient assumption of the fund in the character of property; as, in *Irwin v. Farrer* (b), the bill was an indication of the intention of the donee to take the legacy for her own benefit.

THE VICE-CHANCELLOR said, that it being clear the executors of the several female legatees could only take the fund as part of the estates of such legatees, that the legatees were authorized to make an immediate disposition of their legacies, either by a revocable or an irrevocable act; and that their executors could not dispute, or claim in opposition to, the act of such legatees, he was of opinion that the petition was in such a case equivalent to an appointment, and that therefore the orders ought to be made as sought by the petitions.

In the cases of the married women, the stock was ordered to be sold, and the money to arise by the sale, and the dividends accrued, to be paid to each petitioner on her sole receipt.

(a) See 2 Roper, *Husb. & Wife*, by Jacob, p. 213; *Id.* 1 vol. p. 254; and *Fredrick v. Hartwell*, (1 Cox, 198,) there cited.

(b) 19 Ves. 86.

 1843.—Hyde v. Dallaway.

*HYDE v. DALLAWAY.

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1843: 1st, 3rd, and 4th March.

A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer.

Held, that such possession was not adverse during the existence of the life estate so purchased, and that the Statute 3 & 4 Will. 4, c. 27, s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner.

BILL for specific performance by vendors against a purchaser. Reference of title. The Master reported that the Plaintiffs had not shewn a good title. The Plaintiffs excepted to the report.

Saville Hyde, being the mortgagee of the premises comprised in the contract, under a mortgage thereof created by the tenant for life and the remainderman, upon which the principal sum of 4000*l.* and a considerable arrear of interest was due, entered into possession of the premises in the year 1817, in his character of mortgagee. He afterwards, in the year 1823, purchased the interest of the tenant for life of the equity of redemption. *Saville Hyde* continued in possession of the premises until his death, in 1880. *Saville Hyde* devised the premises to the Plaintiffs, their heirs, executors, administrators, and assigns; and the Plaintiffs continued in possession in receipt of the rents and profits until the same were put up for sale by auction in June, 1889, when the Defendant, being the highest bidder, signed the contract in question for the purchase of the premises, at the price of £2700. No acknowledgment of the title of any mortgagor or mortgagors to, or of any right or equity of redemption of, the premises, was made or given by or to any person whomsoever, from the time that *Saville Hyde* entered into possession thereof as mortgagee, in 1817 (a).

The Defendant insisted, that from the time that *Saville Hyde*, the Plaintiffs' testator, purchased, in 1823, the interest of tenant for life of the equity of *redemption, he could [*529] not be regarded as a mortgagee in possession; and that

(a) See Stat. 3 & 4 Will. 4, c. 27, s. 28.

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interest not appearing to have determined, there was no adverse possession (a), or, at all events, no adverse possession for twenty years to constitute a bar to the owner of the equity of redemption, and consequently that the vendors could not convey an absolute, but only a mortgage title: *Corbett v. Barker* (b), *Ravald v. Russell* (c), *Raffety v. King* (d), 2 Sugd. Vend. & Pur. 361. The Plaintiffs contended, that the statute of limitation having begun to run against the mortgagors, on the entry of the mortgagee into possession in 1817 (e) was not interrupted by the fact that he had endeavoured to strengthen his title by getting in the life interest in 1823: *Harrison v. Hollins* (g), *Beckford v. Wade* (h). The period which had elapsed, taken also in connection with the fact that the mortgage debt so greatly exceeded the value of the premises, rendered any attempt to disturb the title of the mortgagee, or those claiming under him, such a remote possibility, that the Court would not regard it as an objection to the title: *Dyke v. Sylvester* (i), 2 Sugd. Vend. & Pur. 183. ed. 10.

Mr. Temple and Mr. Dunn, for the Plaintiffs, and Mr. Roupell and Mr. Wood, for the Defendant.

THE VICE-CHANCELLOR, after disposing of other points in the cause :—

[*530] "I cannot compel the purchaser to take a title depending on the operation of the Statute of Limitations under the circumstances of this case. The possession of the mortgagee appears to me, in point of fact, not to have been adverse. The 28th section supposes the existence of a person to whom the acknowledgment is to be made, as well as that of the party to make it: there must be not only a party to redeem, but one to be redeemed.

(a) Sect. 3.

(b) 1 Anst. 138; S. C. 3 Id. 755.

(c) 1 Younge, 19.

(d) 1 Keen, 601.

(e) See 3 & 4 Will. 4, c. 27, ss. 2, 28, amended by 7 Will. 4 & 1 Vict. c. 28.

(g) 1 S. & S. 471.

(h) 17 Ves. 99.

(i) 12 Ves. 126.

 1843.—Harrison v. Stewardson.

The parties in this case were not, I think, in the situation which the Statute contemplates, as creating a bar. The mortgagee became, in effect, the tenant for life of the equity of redemption: the remainderman or reversioner may therefore properly look upon him as holding in that character. He would not necessarily refer his possession to any other title. It would be a surprise upon the parties interested in the property, after the expiration of the life interest, if they were told that the tenant for life had another and an adverse title, by means of which they are to be barred, and the tenant for life to acquire an absolute interest.

Exception overruled.

 HARRISON v. STEWARDSON.

1842: 22nd Dec. 1843: 11th Jan., 19th April, 13th June.

Twenty creditors, interested in a real estate, are not so large a number that the Court will, on the ground of inconvenience alone, allow a few of them to represent the others, and dispense with such others as parties in a suit to recover the estate against the whole body of creditors.

THE Plaintiff was a creditor of the Defendant *Stewardson*, and recovered judgment against him for 120*l.* damages and 13*l.* 2*s.* costs, which was entered up, and a memorandum thereof registered by the Senior Master of the Common Pleas, in February, 1840. In January of the same year, while the Plaintiff's action was pending, *Stewardson* conveyed and assigned his real and personal estate to *Procter* and *Wharton*, in trust for [*531] such of his creditors as should execute the indenture within three months. *Procter* and *Wharton*, who were themselves creditors, executed the deed in the same month of January, and eighteen of the other creditors executed it in April following, after the Plaintiff's judgment was registered. *Procter* and *Wharton*, in October, 1841, sold the real estate (consisting of about twenty-six acres of land, subject to a mortgage for £500) to the Defendant *Park*, for the sum of £120. The Plaintiff filed her bill in March, 1842, stating that the creditors who had executed the said indenture

1848.—Harrison v. Stewardson.

were so numerous, that it was impossible to make them parties, or to prosecute the suit if they were made parties. The bill prayed that the sum due upon the judgment might be declared to be a charge upon the said land prior to any interest created by the conveyance to *Procter* and *Wharton*, or by the sale to *Park*; and that the premises might be sold, and the proceeds applied in payment of the incumbrances, according to their priorities. The Defendants *Procter* and *Wharton* stated in their answer the names of the persons who had executed the deed. *Park* objected by his answer that such creditors were necessary parties. The bill was taken pro confesso against *Stewardson* (a). At the hearing

Mr. *T. J. Phillips*, for the Defendants *Procter* and *Wharton*, submitted, that all the creditors who had executed the assignment of January, 1840, were necessary parties.

Mr. *Anderdon* and Mr. *Bird*, for the Defendant *Park*.

[*582] Mr. *Tinney* and Mr. *Lewin*, for the Plaintiffs, argued, 1. That the only creditors who executed the deed, before the Plaintiff's judgment, were before the Court, and the others had acquired no interest in the estate as against the Plaintiff. 2. That it appeared by the answer that there were eighteen creditors who had since executed the deed, and they were therefore too numerous to be made parties. 3. No direct relief was sought against the creditors who were absent, and their rights, so far as they could be affected in this suit, were sufficiently protected by the trustees and creditors who were before the Court.

The following authorities were referred to—*Newton v. Earl of Egmont* (b), *Harvey v. Harvey* (c), *Douglas v. Horsfall* (d), *Lord Redesdale*, Tr. Pl. p. 142, ed. 3, p. 174, ed. 4, where it is said that "trustees of a real estate for payment of debts or legacies may sustain a suit either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they are trustees, which in many cases would be almost impossible; and the

(a) See p. 533, *infra*.

(c) 4 Beav. 215.

(b) 5 Sim. 130.

(d) 2 S. & B. 184.

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rights of the creditors and legatees will be bound by the decision of the Court against the trustees."

VICE-CHANCELLOR :—

It is impossible to say that the practice of the Court is in conformity with the passage which has been cited from Lord *Redesdale's* Treatise, for almost the universal rule is to make legatees parties whose legacies are charged on real estate. To relieve parties from this necessity in cases where trustees are fully empowered to administer and distribute real estate, and to place such trustees in a position analogous to that of executors, is "the [*533] purpose of the 30th order of August, 1841. In cases like the present the general rule is, that all the persons interested in the estate shall be parties to the suit. Upon the facts, as they appear, I cannot assume that there will be any practical difficulty, or that these creditors will of necessity be litigious. I am satisfied that there is no authority for saying that the number of eighteen or twenty persons is so great, that the inconvenience of making them parties should lead the Court to dispense with their presence in the suit, and allow their interests to be represented by the two who are before the Court. The cause must stand over, with liberty to amend. The Defendant *Park* is entitled to the costs of the day.

Process for taking a bill pro confesso under the 1st order of the 11th of April, 1842, against a defendant deemed to have absconded, after appearance by his own clerk in Court.

Order 1 of the 11th of April, 1842, as to taking bills pro confesso, applies to suits commenced before as well as after, the date of the order.

The bill was filed against the Defendant *Stewardson* and others on the 24th of March, 1842. The solicitor of *Stewardson* instructed his clerk in Court to enter an appearance for *Stewardson*, and his clerk in Court accordingly entered the same on the 5th of April. On the 7th of September, an attachment for want of answer was is-

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sued against *Stewardson*, to which the sheriff returned non est inventus.

The Plaintiff moved, under Order I. of the 11th of April, 1842, upon notice served (under the second clause of that order (a) upon the solicitor (b), by whom the Defendant had appeared, that the bill might be taken pro confesso against the Defendant *Stewardson*.

The affidavit of the sheriff's officer stated that he received [*534] the attachment, and on the 27th of September went to *Butt Yeates* near *Hornby* in the county of *Lancaster*, as he was directed, in order to execute the same,—that he was informed that *Stewardson* had left the farm he had occupied at *Butt Yeates*, in May preceding: that he had made inquiries for him in the neighbourhood, and particularly had inquired of the steward of the lord of the manor, who resided in *Hornby*, and he had been informed, in answer to such inquiries, and he believed it to be true, that *Stewardson* had not been seen in that neighbourhood since May: that he had in that month been seen at *Liverpool*, and had gone to *America*, and that deponent was unable to execute the warrant (c). By another affidavit, *M.* stated that he was acquainted with *T. Noble*, who had left this country for *America* about ten years ago, that *Noble* had lately returned to *England*, and that, at the request of the Plaintiff's solicitor, *M.* had called upon *Noble*, and *Noble* had informed him that a short time before he left *America*, *Stewardson* came to his (*Noble's*) house in the State of *Ohio*, and he (*Noble*) had employed *Stewardson* as a farm servant, and *Stewardson* was working for him as such servant at the time he left *America*; that *Noble* had brought a letter from *Stewardson* to some of his relations; and that he refused to make any affidavit of the facts. And by a third affidavit, *B.* deposed that he knew and had lately con-

(a) Beav. Ord. Can. 196.

(b) Instead of the clerk in Court: Order XVI. of the 26th of October, 1842.

(c) The further affidavits were filed, owing to the Court not being satisfied that the facts appearing on the first affidavit afforded sufficient evidence of the absconding. The *Vice-Chancellor* said, that in all cases of taking bills pro confesso under the order, the affidavit under which the proceeding was founded must distinctly shew the means which the deponent had of knowing the parties, and the facts, to which he deposed.

 1843.—Wilton v. Clifton.

versed with the father of *Stewardson*, who spoke of his son the Defendant, as being resident in *America*.

*Mr. *Hubback*, for the motion.

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THE VICE-CHANCELLOR, (on the undertaking of the Plaintiff to serve a copy of the order on or before the 31st of January upon the solicitor who had acted for *Stewardson* in the beginning of his defence, and also upon the father of *Stewardson*), and upon affidavit of such service, ordered, that the cause should stand until the first day of Easter Term, and that the clerk of records and writs should attend at the hearing with the record of the Plaintiff's bill, that the same might be taken pro confesso against the Defendant *Stewardson*, unless he should, on or before the said first day of Easter Term, shew cause to the contrary.

WILTON v. CLIFTON.

13th and 14th February :

Form of the jurat in taking the answers of Defendants, and particularly where the Defendant is illiterate.

MOTION to take the answer off the file for irregularity, with costs to be paid by the Defendants. The ground of motion was the alleged defects in the form of jurat :—" Sworn by the Defendant *Mary Clifton*, at the dwelling-house of &c., situate &c., this 24th day of December, 1842: the witness to the mark of the said Defendant having been first sworn, that he had truly, distinctly, and audibly read over the contents of this answer to the said Defendant *Mary Clifton*, and that he saw her make her mark thereto. Before me,
" *D. Drew*."

The clerks of record and writs were required to certify whether the jurat ought to state, first, that the Defendant, being illiterate, appeared to understand the answer; secondly, [*536] that she affixed her mark in the presence of the officer ad-

 1843.—*Chambers v. Bicknell*.

ministering the oath ; and thirdly, the office held by *D. Drew*, whose name was subscribed. The clerks of record and writs certified that the jurat was in its usual form, and that the description of the officer was never added.

THE VICE-CHANCELLOR said, the form of jurat that appeared to be used on taking answers by commission was the better form ; but this jurat was not irregular : and being asked to be discharged, with costs, he refused the motion with costs.

Mr. *Collins* moved, and Mr. *Temple* opposed the motion. The General Order, 27th April, 1748 ; Beame's Orders, 451 ; 2 Dan. Ch. Pr. 279 ; 2 Smith, Ch. Pr. 505 ; *Pilkington v. Himswoth* (a), and *Attorney-General v. Malim* (b), were mentioned.

CHAMBERS v BICKNELL.

13th and 14th February :

A party to whom letters of administration have been granted, as the attorney of the person entitled to the grant, and for the use and benefit of such person, is liable to be sued in respect of the estate by the parties beneficially interested in it, in the same way as he had obtained letters of administration in his own right.

W. CHAMBERS, by his will, dated in July, 1838, bequeathed the residue of his property, to be equally divided between *Ann*, his wife, and his two children: The testator died in *India*, leaving his wife and two children surviving. The widow resided in *India*, and by a power of attorney appointed the Defendant *Bicknell* [*537] her agent in *England*. Under this power *Bicknell* obtained letters of administration, as such attorney (c), of

(a) 1 Y. & Coll. 615, n.

(b) 1 Yo. 376 ; 1 Y. & Coll. 614, n.

(c) The letters of administration were in the following form :—

“ William by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, to our well-beloved in Christ *J. S. Becknell*, the lawful attorney of *Ann Chambers*, widow, the relict and one of the universal legatees named

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the estate of the testator in this country. One of the children of the testator, in 1840, filed his bill against *Ann* (his widow), her second husband, and the other child, (all of whom were alleged to be out of the jurisdiction), and against *Bicknell*, for the administration of the testator's estate. *Bicknell* alone appeared.

At the hearing,

Mr. Prior, for the Defendant *Bicknell*, submitted that he was the agent of, and if not exclusively, at least primarily, accountable to, his principal, *Ann* the widow; that supposing there was any privity between him and the plaintiff, yet it was a material question whether he would be discharged by any thing done in a suit to which the widow was not a party. *Bicknell*, by the effect of the recital in the letters of administration, was made answerable to her. *De la Vi-essa v. Lubbock* (a). He was, however, willing to act as the Court should direct.

in the will of *W. Chambers* late of &c., in the *East Indies*, deceased, greeting: whereas the said *W. Chambers*, having, while living, and at the time of his death, goods, chattels, or credits in divers dioceses or jurisdictions, did, as is alleged, in his life-time, rightly and duly make his last will and testament hereunto annexed, and did not therein name any executor, and we, being desirous that the said goods, chattels, and credits may be well and faithfully administered, applied, and disposed of according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the said goods, chattels, and credits according to the tenor and effect of the said will; and first to pay the debts of the said deceased which he did owe at the time of his death; and afterwards, the legacies contained and specified in the said will, so far as such goods, chattels, and credits will thereto extend: and the law requires you, having already been sworn, well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels, and credits, and to exhibit the same into the registry of our Prerogative Court of Canterbury on or before the last day of August, next ensuing; and also, to render just and true account thereof: and we do, by these presents, ordain, depute, and constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, with the said will annexed, for the use and benefit of the said *Ann Chambers*, now residing at *Surat*, in the Presidency of *Bombay*, in the *East Indies*, and until she shall duly apply for and obtain letters of administration (with the said will annexed) of the goods of the said deceased to be granted to her. Given, at *London*, the 3rd day of February, in the year of our Lord 1840, and in the 12th year of our translation."

(a) 10 Sim. 629.

 1843.—Chambers v. Bicknell.

Mr. *Kenyon Parker*, for the Plaintiff, cited *Tyler v. Bell* (a), *Wallace v. Campbell* (b), *Attorney-General v. Dimond* (c).

VICE-CHANCELLOR :—

It appears that administration of the estate of the testator has been granted to the Defendant, as the attorney of the widow, and for her use and benefit; and a doubt has been suggested whether the grant in this form places *Bicknell* in such a position that the Court can act against him at the suit of the other parties beneficially interested in the estate, or at least can so act in the absence of the widow. It was said that he held the money as her agent, and was accountable to her, and to her alone. The case of *De la Vi- esca v. Lubbock* was referred to, upon which case I am not called upon, nor do I presume, to make any observation. The *Vice-Chancellor* seems to have held that where administration has [*589] been granted to the attorney of a person, "for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country. That case certainly affirms the proposition that *Bicknell* is to be considered as the agent of the widow, and accountable to her. I do not think that it bears further upon the point now before me. The question then arises whether the Plaintiff is entitled to sue *Bicknell* or not. The case of *Anstruther v. Chalmer* (d) is a very important case on this subject. *Catherine Anstruther*, having made her will, died, and *Elizabeth Campbell* her sister, and only next of kin, by her power of attorney, authorized *Chalmer* and *Fraser* to obtain the administration of the testatrix's estate from the Ecclesiastical Court as her attornies, and they accordingly obtained such administration as attornies of *Elizabeth Campbell*, and, as in the present case, "for the use and benefit" of that person. The question was thereupon raised, whether, the let-

(a) 2 Myl. & Cr. 89.

(c) 1 Cr. & Jer. 356.

(b) 4 Y. & Coll. 167.

(d) 2 Sim. 1.

 1843.—*Brown v. Perkins.*

ters of administration being expressed to be granted to *Fraser* and *Chalmer* for the use and benefit of *Elizabeth Campbell*, that circumstance did not exclude the parties beneficially interested in the estate from any claim against the attornies; that is,—whether they were not merely agents. Sir *Anthony Hart* directed the case to stand over, that it might be ascertained whether the question had not been decided by the Ecclesiastical Court, in the form in which the letters of administration had been granted. A certificate from the deputy register of the Prerogative Court was afterwards produced, which stated in substance that the words used in the grant of letters of administration were invariably used when it was made under a power of attorney from the parties entitled to representation, *and that these words did not exclude the [*540] claim of others to share in the estate. It could not exclude those beneficially interested: and it was decided in that case that the plaintiff might sue. I am of opinion that the Plaintiff may, in this case also, sustain a suit against the administrator, notwithstanding the character in which he has taken upon him that office. The suit, however, must be properly framed, and for that purpose the plaintiff may have liberty to exhibit interrogatories to prove that the other Defendants are out of the jurisdiction.

The Defendant *Bicknell* not opposing, an account of the testator's estate received by him was directed, without prejudice to the rights of the absent parties: the money in the hands of *Bicknell* was ordered to be paid into Court, and liberty given to the Plaintiffs to exhibit interrogatories to prove that the other Defendants were out of the jurisdiction.

 BROWN v. PERKINS.

1843: 16th March.

In a suit for taking a partnership account between solicitors, the Plaintiff is entitled to the discovery and production, in the usual way, of papers material to the account, although such papers relate to professional business transacted for their clients:—*Semle.*

BROWN and Perkins were solicitors in partnership at *Merthyr*
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Tydvil (a). Brown died, and his representatives filed a bill against the surviving partner for an account; and an answer being put in, the Plaintiffs moved for the production of the papers admitted in the answer of the Defendant to be in his possession and material to the account. The Defendant stated that many of the papers referred to the business of the clients of himself and his late partner, and concerned matters in which they had been entrusted in their professional character in secrecy and confidence; and that the disclosure of such matters to the solicitor of the Plaintiffs, who practised in the same town and neighbourhood, might be prejudicial to such clients; and would be a breach of duty towards them; and that in several of such matters the solicitor of the Plaintiffs was employed adversely, in his professional capacity, for other persons.

Mr. *Roupell*, for the motion, relied on the general rule entitling the Plaintiff to the production of material documents.

Mr. *W. M. James*, contra.—The Court will not compel a disclosure which will be a breach of confidence as against those by whom the parties have been entrusted. If any inconvenience should result from withholding the production, it is better that it should be suffered by the solicitor than the client.

VICE-CHANCELLOR :—

The partners themselves, if they had been both living, and the question of account had arisen between them, would both have been entitled to see the papers which are part of the materials for taking the account: and it must, I think, follow that either of the partners might have employed a competent agent for the purpose of examining the papers on his behalf. If this be not so, no solicitor can employ another person to assist in the settlement of his partnership accounts, without submitting to have such accounts taken in an insufficient manner.

In this case, I should think it would be a reasonable course for

(a) The case is reported on the argument of a plea to the bill: vol. 1, p. 564.

1843.—Colburn v. Simms.

the papers to be inspected by some disinterested person,—such as a town solicitor, or one not practising in the neighbourhood of these parties: but such an arrangement, if made, must be by consent.

The order for production was arranged between the parties, in conformity with his Honor's suggestion.

PHILLIPS v. PRENTICE.

June 12th.

An affidavit which does not express that the deponent "made oath," is not admissible.

An affidavit, commencing in this form,—“ A. B., of &c., saith that,” &c., not “ adding maketh oath,” or any words of like signification—was held, on the authority of *Oliver v. Price* (a), to be inadmissible, notwithstanding the jurat expressed that it was “ sworn by the said A. B., at” &c.

Mr. Biggs and Mr. Younge, of counsel.

*COLBURN v. SIMMS.

[*543]

1843: 24th March, 25th and 26th April.

The proprietor of a book, whose copyright has been invaded by the printing of a similar work, and who is entitled to an injunction to restrain the printing and sale of the unlawful work, is not, under the Statute 54 Geo. 3, c. 156, s. 4, entitled to an order for the delivery up of the illegal copies,—if the book, the copyright of which has been infringed, was not composed, and entered according to the statutes, at the time the illegal copies were printed.

Seemle, there is no common-law right in the author or proprietor of a book which is pirated, to the delivery up of the copies of the illegal work; and, therefore, if such relief is given in equity, it must be under the provisions of the statutes for the protection of literary property.

Whether the copies of the illegal work would in any case be ordered to be delivered up in a suit to which the person at whose expense and on whose account they had been printed was not a party,—*Quære*.

Whether a Court of Equity is a court of record within the meaning of the Statutes 41 Geo. 3, c. 107, s. 1, or 54 Geo. 3, c. 156, s. 4,—*Quære*.

(a) 3 Dowl. Rep. K. B. Pract. 261.

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Where a Defendant, having rendered himself liable to be sued, and being sued, offers to submit to all the relief to which the Plaintiff is entitled, the Court will not give the Plaintiff his costs of the subsequent prosecution of the suit.[1]

A Plaintiff who is entitled to have an account taken of profits unlawfully made by the Defendant, is not bound to except the statement of the account on affidavit instead of by answer, but may call for an answer from the Defendant, without therefore disentitling himself to the costs in respect of the answer, although he afterwards waives the account.

By an agreement in writing, dated in July, 1839, between Dr. *Granville*, of the one part, and *Henry Colburn*, of the other part, for the considerations therein mentioned, Dr. *Granville* agreed to visit the principal spas and watering-places in England, and write an account of them, including advice to invalids, &c., on the plan of his work on the "Spas of Germany;" the work to be published by *H. Colburn* for his own use and benefit: and Dr. *Granville* thereby agreed to assign the copyright of the work to *H. Colburn* for the sum of £300, payable in manner therein mentioned: and Dr. *Granville* thereby further agreed not to be concerned in any other work of similar description, but to give the entire results of his visits to the English spas in the said work, and also not to do anything that might at all interfere with the value of the copyright. Dr. *Granville* accordingly visited the English spas, and furnished the Plaintiff with the manuscript of the work at different times. The volume containing the Northern Spas was first published in February, 1841; and another volume, containing the Southern Spas, was published in July, 1841. Before the publication of [*544] the latter book, the Plaintiff observed an advertisement of an intended publication by *Simms & Son* of *Bath*, described as in the press, and intituled "The Invalid's and Visitor's Hand Book to the Hot Springs of Bath, by Dr. Granville, Author of the Spas of Germany, Spas of England, &c." The solicitor of the Plaintiff, thereupon, by his direction, on the 29th of June, wrote to *Henry Simms* of *Bath*, acquainting him that Dr. *Granville* was under an engagement to be concerned in any other work of a similar

[1] See *Kelly v. Hooper*, 1 Young & Coll. 197, and note 1 to that case, by American Editor, at page 200. *Millington v. Fox*, 3 Myl. & Cr. 338. *Sivell v. Abraham*, 8 Beavan, 399. 601.

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description to the "Spas of England," the copyright of which he had sold to the Plaintiff; and as the Plaintiff conceived the work announced was a similar description to the book mentioned, so far as related to the mineral waters of *Bath*, he could not consent to the publication of the work; and that the Plaintiff hoped to hear from Mr. *Simms*, that he would not insist on a right to introduce it to the public after that notice, or he would be compelled to commence proceeding for the protection of his property. In reply to this letter, *Henry Simms*, on the 1st of July, wrote to the Plaintiff's solicitor, and informed him, that he (*Henry Simms*) and Mr. *Green* were lessees of the baths and pump-room at *Bath*: that they had called on Dr. *Granville* very many months before the date of the letter, and arranged with him for a short book on *Bath* waters, which they had since received from him, and for which they had paid him the sum required: that the work was therefore justly their property, and they referred the Plaintiff to Dr. *Granville*, as they were only publishing what was strictly their own. He added, that their object in publishing the little work was with no view to profit on the book, but simply as an advertisement to their establishment.

The "Invalid's and Visitor's Hand Book" was published on the 30th of September, 1841, by the "Defend- [*545] ants, *S. Simms* and *S. W. Simms*, (who were in business as booksellers and publishers in *Bath*, under the firm of *Simms & Son*), and by *C. Tilt* and *D. Bogue*, publishers in *London*.

In October, 1841, the Plaintiff filed his bill against *Simms & Son*, *Tilt & Bogue*, and Dr. *Granville* stating his agreement with Dr. *Granville*, and the correspondence which had taken place; and stating also, that he had since endeavoured unsuccessfully to communicate thereon with Dr. *Granville*, who had been abroad. The Plaintiff alleged that the "Hand Book" was, with very trifling alterations, a copy of the chapters on *Bath* in the larger volume, relating to the Southern English Spas: that the "Hand Book" had not been published by the said *Henry Simms* or the said Mr. *Green*, but by the Defendants *Simms & Son*. The bill prayed that an account might be taken of all and singular the copies of the said "Invalid's and Visitor's Hand Book" which had been sold by the Defendants,

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and each or any of them, and of the profits which would have been made by the Plaintiff if he had sold the same number of copies of the work called "The Spas of England," published by him, the copyright whereof had been infringed by the publication and sale of the said "Hand Book;" and that the Defendants might be decreed to pay to the Plaintiff the amount of such profits; and that an account might be taken of all monies paid and agreed to be paid to and received by Dr. *Granville* for or in respect of the said "Hand Book;" and that the plaintiff might be declared entitled to all such monies, that the same might be paid to the Plaintiff accordingly; and and that the Defendants might be restrained by injunction from printing, publishing, selling, or otherwise disposing of the said "Hand Book," or any copy thereof, or any part of the

[*546] said "Spas of England" so published by the Plaintiff, or any work written or composed by Dr. *Granville* of a similar nature or description to the work so published by the Plaintiff, or to any part thereof: and that Dr. *Granville* might be decreed specifically to perform the said agreement of July, 1839, so far as the same remained to be performed on his part, and to do and execute all such acts and instruments, if any, as might be requisite for perfecting and confirming to the Plaintiff the legal title to the copyright in the "Spas of England" so published by him, and every part of the said work; and that Dr. *Granville* might be restrained by injunction from assigning or otherwise disposing of to the Defendants, or any of them, or any other person, the copyright of the same work, or of any part thereof, or of the said "Hand Book," or any other work similar to or of the same description as the work so published by the Plaintiff, or any part thereof, and from being concerned in any work of a similar description to, or which might interfere with the value of the copyright of, the work so published by the Plaintiff; and that the Defendants might be decreed to deliver up to be cancelled all copies of the said "Hand Book" in their or any of their possession or power.

On the 30th of October the Plaintiff obtained an injunction, restraining *Simms & Son*, and *Tilt & Bogue*, from printing, publishing, selling, or otherwise disposing of the "Hand Book;" and

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on the 6th of November he obtained a second injunction, restraining Dr. *Granville* from printing or publishing that, or any similar work. No application was made to dissolve either of these injunctions.

The answer of the Defendants *Simms & Son* stated, that they had caused the "Hand Book" to be printed, on account and at the expense of the said *Henry Simms* *and *W. [*547] Green*; that they (the Defendants) had no interest in the work, but only received the usual allowance for its sale; and that they were ignorant of the agreement between the Plaintiff and Dr. *Granville*, or that the publication involved any infringement of the Plaintiff's rights. They said that they believed Dr. *Granville* wrote and composed the manuscript of the "Hand Book" before he wrote and composed the chapter on *Bath* in the Plaintiff's book on the Southern Spas, and that the "Hand Book" was printed from such manuscript. They admitted the publication of 508 copies of the "Hand Book;" of which they had sold 241,—sent 100 to the Defendants *Tilt & Bogue*,—10 to *Green* and *Simms*,—left one with the printer, and retained 373, which since the injunction, they had not offered for sale, and did not intend to sell. They stated that *Green* and *Simms* had paid 118*l.* 10*s.* in respect of the publication, and 5*l.* 6*s.* 6*d.* had been received for the copies sold. They submitted, that as to part of the relief, with which they had no concern, the bill ought ought to be dismissed with costs as against them.

The Defendants *Tilt & Bogue* by their answer stated that they had no concern with the publication of the "Hand Book," save that of having permitted their names to be used as the *London* publishers, and being employed to sell the work on commission, for which purpose they had received 100 copies, 9 of which they had sold before the injunction was issued, and the remaining 91 they had since returned to the solicitor of the Defendants Messrs. *Simms*.

Dr. *Granville* admitted the material facts, and said that he had one copy of the "Hand Book," which was not for sale.

*All the Defendants submitted that the Plaintiff was [*548] not entitled to the costs, inasmuch as he had called for the answers, and unnecessarily proceeded with the suit; and in proof

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thereof, they stated that their solicitor, on the 30th of January, 1842, in order to terminate the suit, wrote to the solicitor of the Plaintiff a letter as follows :—

“ I am instructed by all the Defendants to inform you that they submit to the injunctions obtained against them respectively, and that they are ready at once to pay the Plaintiff his taxed costs of the suit. I herewith forward you a statement of the number of the copies of the ‘ Hand Book ’ published by the Defendants, the publishers thereof, and of those which had been sold, and of the sums of money paid and received in respect of such work. By this statement you will perceive, that so far from the Defendants’ having made any profit by the sale of the work in question, a very heavy loss has been incurred. My clients are ready to verify the account contained in this statement by affidavit, if you require them to do so. With reference to Dr. *Granville* in particular, the Plaintiff’s bill requires that the agreement should be specifically performed, so far as the same remains to be performed on his part, and that he may do and execute all such acts and instruments, if any, as may be requisite for perfecting and confirming to the Plaintiff the legal title in the copyright of the ‘ Spas of England.’ Now, I am instructed by that gentleman to say, that misapprehension of the nature of his rights and obligations under his agreement with Mr. *Colburn* alone could have caused him to have been a party to any act which could be deemed an invasion of Mr. *Colburn*’s rights thereunder, and that he, Dr. *Granville*, has no intention of acting contrary to the terms thereof, and is quite willing at once to execute any

[*549] instrument *you may deem proper to tender him for perfecting your client’s legal title to the copyright which he has purchased, if indeed the Doctor has not already executed, as he believes he has, such an instrument ; for he says, that at the interview which he had with Mr. *Colburn*, about the latter end of June last, he signed some document, which he then understood to be an assignment. If he is mistaken you will probably be good enough to undeceive him and forward me a copy of the document which he did then sign. As to the relief asked by the Plaintiff’s bill with respect to the sum of money paid to Dr. *Granville* for the work in

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question, seeing that he will have to reimburse his Co defendants, the publishers, all their expenses incurred about the work, I am advised that the Plaintiff is not entitled to what he seeks in respect thereof; neither is the Plaintiff, as I am advised entitled to insist upon having the books delivered up to be cancelled. With the concession here made, I submit, Mr. *Colburn* ought to be satisfied. I cannot help believing, that upon reflection you will deem it right to recommend Mr. *Colburn* to consent to discontinue the further prosecution of this suit upon payment of his costs, and which would be done immediately after the amount was ascertained: the injunction to continue perpetual. In the mean time, until I hear from you, my counsel will delay preparing the answer." And that on the 14th of February, 1842, the solicitor of the Plaintiff wrote to their solicitor as follows:—

"I have seen Mr. *Colburn*, and he altogether declined your proposal: and it seems to me he is right. Upon what principle it is to be contended that, because the act of your client has been unproductive to him, or his vendors, the Plaintiff cannot therefore have sustained injury, I am at a loss to discover. After you have expended more than the sum in question between *us [*550] in additional costs, I hope you will discover that that is not the correct mode by which Dr. *Granville* will be allowed to decrease the payment to be made to Mr *Colburn* for the offence of which he has been guilty."

At the hearing of the cause the Plaintiff waived his right to the account,—the Defendants submitted to the perpetual injunction,—and Dr. *Granville* to execute the assigment of the copyright.

Mr. *Bazalgette* and Mr. *Romilly* for the Plaintiff, on the only remaining relief prayed, namely, the right to delivery up of the copies, relied on the statutes 8 Ann, c. 19; 41 Geo. 3, c. 107, s. 1, and 54 Geo. 3, c. 156, s. 4. The last act, after giving to the author or proprietor of the copyright an action for damages against any person infringing the exclusive right thereby given, in the manner therein stated, adds,—“and all and every such offender and offenders shall also forfeit such book or books, and all and every sheet being

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part of such book or books, and shall deliver the same to the author or authors, or other proprietor or proprietors of the copyright of such book or books, upon order of any court of record in which any action or suit in law or equity shall be commenced or prosecuted by such author or authors, or other proprietor or proprietors, to be made on motion or petition to the said Court; and the said author or authors, or other proprietor or proprietors shall forthwith damask or make waste paper of the said book or books and sheet or sheets." The right to the decree for the delivery of the copies carried with it the right to the costs of suit. But with regard to costs, [*551] the Plaintiff was not bound to be satisfied with "the affidavits of the Defendants as to the profits they had made. He was entitled to an answer, and having properly called for an answer, he was not then under any obligation to dismiss his bill. *Kelly v. Hooper* (a).

Mr. Beavan, for the Defendants *S. Simms* and *S. W. Simms*.

The bill has two distinct objects,—first, the specific performance of the agreement between the Plaintiff and Dr. *Granville*; and, secondly, relief against the alleged piracy. With the first object these Defendants have no concern: the bill is multifarious, and so far as the suit related to the first object, it ought, as against them, to be dismissed with costs. From the answers, as well as from passages in the two books, it must be inferred, that the part of the Plaintiff's book relating to *Bath* was copied from the "Hand Book," and the Defendants have dealt with the legal owner without notice of any equitable interest. According to *Millington v. Fox* (b), the Plaintiff is not entitled to the costs, although the injunction is made perpetual—the whole relief to which he was entitled having been offered to him before answer. He, however, now contends that he is entitled, not to what he required upon the correspondence which took place, but to the delivery of the copies, which was not at first insisted upon. The Plaintiff must derive his right to have the copies delivered up wholly under the statute, for independently of the statute this Court would not interpose in a case of forfeiture;

(a) 1 Y. & Coll. C. C. 197.

(b) 3 Myl. & Cr. 338.

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the Court always requires all incidental penalties and forfeitures to be waived. But the Plaintiff is not entitled to the relief under the statute : first, because if he proceeds under the statute, he must be confined to what the *statute gives him ; he [*552] cannot come for the whole remedy which the ordinary jurisdiction of the Court will give, and add to that relief a penalty under the statute. The account of the profits asked in this Court is, in fact, relief inconsistent with the terms of the act. Secondly, to bring the case within the act, the printing must have taken place after the publication by the Plaintiff ; but that is not shewn, and the inference is the contrary. Thirdly, the forfeiture is to be made to the “ author or proprietor :” but Dr. *Granville*, and not the Plaintiffs, is the author, and still the legal proprietor : he alone could sue at law ; and this is a kind of relief which equity will give only to the party who could have recovered at law ; where, by this clause of the act, there is at least a concurrent jurisdiction. Lastly, Messrs. *Green* and *Simms*, the owners of the Hand Books, or the paper on which they are printed, are not parties : the Defendants *S. Simms* and *S. W. Simms* are merely their agents : the Court will not order the delivery up of the copies in the absence of the owners. The order for this purpose can in fact be made against none other than the principals, and through them the agents would be compelled to obey it. The delivery of the copies is to be ordered upon motion or petition, and the hearing of the cause was unnecessary for that purpose : the claim is not therefore a justification for incurring costs, after the offer of the settlement, and the Defendants ought to be indemnified against the subsequent costs.

Mr. *Headlam*, for the Defendants *Tilt & Bogue*, and Mr. *Temple* and Mr. *Tripp*, for Dr. *Granville*, in support of the like argument, cited also *Whittingham v. Wooler* (a).

*VICE-CHANCELLOR:—

[*553]

The Defendants having in this case at the hearing submitted to a perpetual injunction, and Dr. *Granville* being ready to

(a) 2 Swanst. 428.

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execute the assignment, while, on the other hand, the Plaintiff is satisfied with the statement of account given by the answer, and has waived a decree for an account, I have only to consider the question of the delivery up of the copies of the "Hand Book" by the Defendants to the Plaintiff, and the question of costs.

I have not, in the course of the argument for the Plaintiff, in support of the claim to have the copies delivered up, been directed to any cases in this Court, or even at law, in which such a right has been enforced; nor am I acquainted with any case in which it has been done. I have moreover the authority of the judge of the longest experience in this Court,—of the *Vice-Chancellor of England*,—for saying that he has never known an instance in which such an order has been made, except in one case, before Lord *Eldon*, where the order was in fact made by consent (a).

The claim of the Plaintiff in this respect has been rested upon the terms of the statutes which I shall presently notice. Now, independently of certain expressions in the statutes which directly point to the jurisdiction of this Court, and supposing this Court not to be a court of record within the meaning of the statutes, the question suggests itself, whether a court of equity will afford any assistance in giving effect to a forfeiture, or, whether the parties ought not, so far as respects this claim, to be left to their remedies at [*554] law. The general rule undoubtedly is, that where a party seeking equitable relief is incidentally entitled to the benefit of a penalty or forfeiture, the Court requires him, as a condition of its assistance, to waive the penalty or forfeiture (b). If, therefore, this Court is bound to order the delivery of the copies, the right to that relief must be found in some common-law right of the proprietor of the copy, independently of the penal provisions of the statutes; or it must be found in those words of the statute which relate to suits in equity. Now, I am not aware that the title of the Plaintiff to the exercise of the jurisdiction of this Court, to com-

(a) See 4 Burr. 2390. On the origin of the clause imposing the forfeiture, see 4 Burr. 2318, 2350.

(b) See Lord Red. Tr. Pl. 195, 287, ed. 4, 157, 231, ed. 3.; 3 Bro. C. C. 38. *Mason v. Murray*, cited, Id. 40; Mos. 75. *Brand v. Cumming*, 22 Vin. Ab. 815, pl. 4.

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pel the delivery up of the copies of the work in question to the proprietors of the copyright, has been, or can be, founded upon any common-law right anterior to or independent of the statute of Queen Anne. There would be great difficulty in applying to this subject the principles of the common law, which in certain cases give to the owner of an original material the right of seizing it, in whatever shape it may be found, if he can prove it to be his own (*a*); or which relate to what is termed confusion of goods, by which, if one man voluntarily mixes his property with that of another, so that the two become inseparable, the entirety is held to belong to him whose property has been invaded (*b*). It may be true, that, if one writes or prints upon the paper of another, the writing or printing becomes his to whom the paper belongs, but it does not necessarily follow that the converse of that proposition would be true,—that one who writes or prints upon his own paper the composition of another, has thereby so mixed his property with the [*555] property of the author whose work he has copied, that he has lost his original title to the material which he has so employed. There might indeed have been some countenance for such a principle before the judgment of the House of Lords, in the case of *Donaldson v. Beckett* (*c*), had confined the exclusive right of authors within the limits prescribed by the statute, and thereby negatived the existence of that absolute common law right in their works which had been previously supposed to exist, and which the decision of the Court of King's Bench, in the case of *Millar v. Taylor* (*d*), had tended to affirm. I think, therefore, the case for the Plaintiff on this point must be placed on another ground, and that his right to a decree of this Court for the delivery up of the copies, if that right exists, must be found within the provisions of the statutes, and not upon any common-law right independent of them. The first ques-

(*a*) 2 Black. Com., ed. by Christian, p. 404, n. (4).

(*b*) 2 Black. Com. 405. See 4 Burr. 2349.

(*c*) 3 Bro. P. C. 129, Tom. ed., Appellant's case, and resolution of the House. 4 Burr. 2408. Opinions of the judges from the Journals. A statement of the speeches more at large is to be found in the *Gentlemen's Magazine* for February, March, and April, 1774.

(*d*) 4 Burr. 2303.

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tion then is, whether these Defendants are offenders amenable to the penal clauses of the statutes on this subject,—arguing upon the case as one in which the complaint is not that the work published by the Defendants is a literal copy of the Plaintiff's work, but as a case in which the claim arises wholly out of the breach of contract by Dr. *Granville* (a).

The first act (8 Ann. c. 19.) is intituled, “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the [*556] Times therein mentioned ;” and it enacts, that the author and his assigns shall have the sole right of printing books then composed, and not printed and published, or that should thereafter be composed, for the term of fourteen years from the day of the first publication,—and then it proceeds to impose a forfeiture of the sheets of paper, together with a pecuniary penalty, in respect of each sheet, upon two classes of offenders against the exclusive right thereby conferred ; first, those who, within the term, print reprint, or import, or cause to be printed, reprinted, or imported, any such books without the consent of the proprietor thereof ; and secondly, upon those who knowing the same to be so printed or reprinted without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale any such books. The subsequent section contains provisions, the object of which is, that the title of the proprietor to the property in the book may be known ; and it is provided that no person shall be subject to the forfeitures or penalties mentioned in the act, unless the title to the copies of the book shall, before publication, be registered (b). It seems to me to be clear upon this statute that these penal provisions are applicable to unlawful copies of such books only as have been actually composed and registered, and are not applicable to books which have not been actually composed and registered. The stat. 41 Geo. 3, c. 107, is similarly intituled,—as being for the purpose of securing the right to the authors of printed books : it increases the penalty for each sheet, and extends both the penalty and the forfeiture so as

(a) See p. 562, *infra*.

(b) See also 15 Geo. 3, c. 58, s. 6.

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to embrace a third class of offenders, namely, persons who shall have in their possession for sale any such book or books without the consent of the proprietor. This act first introduces [*557] the provision which has been mainly relied upon by the Plaintiff in this case,—that the offenders as are previously described shall forfeit the books and sheets, and shall deliver up the same to the proprietor of the copyright, upon the order of any court of record in which any action or suit at law or equity shall be brought, to be made on motion or petition to the said court. The acts on this subject are different in their terms. The last act (the 54 Geo. 3, c. 156) gives the remedy in respect of books then composed and not printed and published, and books thereafter to be composed *and* printed and published, and the special remedy is given as in the act of the 41 Geo. 3. By sect. 5, the entry of the title to the copy of the book is to be made within a month, or the parties are liable to a penalty; but it is provided that the failure to make the entry is not to affect the copyright. Now, I think it is clear upon these statutes, that, in order to become an offender within the penal clauses, the book, the copyright of which is invaded, must at the least have been composed and registered at the time of the offence.

It is plain that, according to the stat. 54 Geo. 3, c. 156, s. 4, as well as according to the reason of the case, a person not knowing that he was committing an injury may publish or sell a work, of which the copyright is in another, with perfect innocence. The act, speaking of the person publishing or selling, says, that it must be with notice that the work was unlawfully printed. The situation of the printer is more onerous: he may be an offender within the terms of the act, and liable to its penalties, even when it is possible that he may have acted in ignorance that he was committing a wrong upon any one. The booksellers might therefore have innocently published this work, though it was a breach of Dr. *Granville's* contract. There may, no doubt be a material distinction [*558] between a printer and a publisher. A printer, copying a work which he finds to exist in print, may be bound to inquire whether the copyright has expired; but a person merely employed

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to sell a work, purporting it to be an original work, may not be under an obligation to make that inquiry.

There is no question but that the court of equity will protect a publisher from a violation of his contract, and will interpose to restrain a party from committing any act amounting to such violation, even if that party had no previous notice ; but it is difficult to hold a party to be an offender within the act, where the offence charged is the publication of that which purported to be an original work, and seems in fact to have been original, although the Defendants had no title to publish it. It is, I think, clear that these persons are not offenders as having printed a book which was previously in existence as a composed and registered book. Though a party is liable to be restrained by injunction from printing a work the copyright of which is in another person (*a*), that does not make him an offender within the act, unless the case brings him within the precise situation contemplated (*b*). The act is remedial to some extent, but, so far as the forfeiture is imposed, it must be construed strictly.

Having come to the conclusion that the Defendants have not made themselves subject to the penal clause in question, I am not called upon to consider whether a court of equity is a court of record within the meaning of the acts 41 Geo. 3 and 54 [*559] Geo. 3, or whether a party is confined to the specific remedy pointed out by the acts 41 Geo. 3. c. 107. and 54 Geo. 3. c. 156. The stat. 8 Ann. c. 19, has not pointed out any particular remedy. It is true that, where an act creates a new right and provides a remedy, many cases decide that the party who would enforce the right must pursue the remedy given by the act ; but the cases decide also, that if an act gives a right or imposes a duty, and does not direct in what manner it shall be enforced, the courts of ordinary jurisdiction must apply the appropriate remedies, and that existing remedies are not taken away by a statute which gives a new one. Between the passing of the stat. 8 Ann.

(*a*) Injunctions before the stat. 8 Ann. c. 19, 4 Burr. 2315, 2317, 2328 ; 2 Bro. P. C. 137, Tom. ed. : after the term given by the statute had expired, 4 Burr. 2325, 2353, 2379 ; and see *Id.* 2399, 2407.

(*b*) See 4 Burr. 2381.

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and that of the 41 Geo. 3, there must have been an interval of time, during which the courts of ordinary jurisdiction would have been bound to find and apply the proper remedies for giving effect to the the former statute in all cases within its provisions; and the jurisdiction thus of necessity existing during the interval is not taken away by the passing of an act which merely gives a special remedy. I cannot, therefore, admit the argument for the Defendants, that, because the statute has given certain specific remedies, therefore a party is precluded from any other remedy which is proper for the protection of the right which the statute gives him, and which he might have had when the act passed. I may also add, that, if the question was merely whether the remedy could be given only upon motion or petition, I should feel no difficulty in directing the cause to stand over, for the purpose of making the motion or presenting the petition.

I desire to guard myself also from being supposed to express any opinion whether I could in this case order the delivery up of the copies in the absence of Messrs. *Green & Simms*: the paper is unquestionably their property, and it would be [*560] an anomaly, if I could order that property to be delivered up and converted into waste paper in the absence of the parties to whom it belongs.

The remaining question is as to the costs. The Plaintiff has succeeded in the most material part of his case by making the injunction perpetual. The supposition, that at the hearing of the cause this Court could give the Plaintiff something beyond the account, was, however, erroneous. It is true that the Court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copy-right by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The Court, by the account, as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has made by his piracy, and gives them to the party who has been wronged.[1] In doing this

[1] See *Cerey v. The Yarmouth and Norwich Railway Co.* 3 Hare, 604.

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the Court may often give the injured party more, in fact, than he is entitled to, for non constat that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed. The Court of Equity, however, does not give anything beyond the account, and I therefore think the Defendants offered all that the Plaintiff was entitled to. With regard to the costs incurred subsequently to the Defendants' offer, the observations of Lord *Cottenham* in *Millington v. Fox* are important. The parties there were perfectly unconscious that they had committed a wrong by the use of another man's mark; and Lord *Cottenham*, after saying that the Plaintiffs were entitled to their decree, adds, that this abstract right of the [*561] Plaintiff was not the only right he "had to guard: there was another object which the Court must keep in view—that of repressing unnecessary litigation, and of keeping litigation within the bounds which are essential to the establishment and vindication of the rights of the parties (a). If a Plaintiff, immediately after the suit is commenced, is offered and may obtain all he seeks, and still thinks proper to go on with his suit, the Court may give him his decree, but will not give him the costs of the suit so unnecessarily prosecuted. I think that is the whole principle of the judgment in *Millington v. Fox*. Lord *Cottenham* had not his attention called to the fact, that the expense of filing the bill had been incurred before the Plaintiffs received the letter offering compensation, and he certainly fortifies his judgment by saying that the Defendants in that case were innocent parties, having committed the wrong ignorantly, which cannot be said of Dr. *Granville* in this case; but I think I am justified by that authority in saying, that where a Defendant offers to give all that a Plaintiff is entitled to, and the Plaintiff refuses the offer, and says, "Because you have committed a fraud I will exercise my power of harassing you with a Chancery suit," this Court will refuse the Plaintiff his subsequent costs (b).

(a) 3 Myl. & Cr. 358.

(b) See some late cases in which orders have been made for dismissal of the bill on motion of the Defendant, submitting to the Plaintiff's demand. *Pamberton v. Topham*, 1 Beav. 316; *Holden v. Kynaston*, 2 Beav. 205.

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In *Kelly v. Hooper* (c), the only question was, up to what point the plaintiff was justified in prosecuting his suit. It appears to me that in this case the Plaintiff was bound to receive affidavits tendered by the Defendants; and with respect to the account prayed, I think he had a right to call for an answer; *I [*562] cannot, therefore, say that I think the Plaintiff was wrong up to the time of getting in the answer. I think the Plaintiff is entitled, as against some of the Defendants, to all the costs up to and including the answer, but that he is not entitled to his costs subsequent to that time. There is a difficulty as between the Co-defendants: Dr. *Granville*, by misleading the other parties, has occasioned the suit, and he therefore must pay the costs of the Defendants, who have been misled by him. *Simms & Son* had some notice of the Plaintiff's claim, but the time of that notice does not appear. The other Defendants deny notice altogether, and there is nothing to lead to the suspicion that they had notice. I shall, unless an inquiry is asked, direct the plaintiff to pay all the Defendants (except Dr. *Granville*) their costs, and add them to his own costs, to be paid by Dr. *Granville*; but if Dr. *Granville* desires it, I will direct an inquiry whether the other Defendants had notice of the Plaintiff's right, and when they had such notice.

The counsel for the Plaintiff stated that his right to the relief which he sought was founded, not only upon the breach of the contract by Dr *Granville*, but also upon the fact that the "Hand Book" was a literal copy of the Plaintiff's book, so far as it related to *Bath*, with a few very minnte alterations, as would appear by comparison of the two books, which, owing to the injunction having been submitted to, it had not been thought necessary distinctly to make at the hearing, and that the judgment pronounced was not therefore conclusive. This fact was not disputed by the counsel for the Defendants.

*VICE-CHANCELLOR:—

[*563]

I gave my opinion upon this case, upon the supposition

(c) 1 Y. & Coll. C. C. 197.

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that the injury complained of, or, at all events, that the grounds upon which alone I had been asked to give relief, was the violation of that part of Dr. *Granville's* agreement by which he had bound himself not to write any work similar to that which he had agreed to write for the Plaintiff, and that the "Hand Book" was a copy of the Plaintiff's work. Assuming this, I was of opinion, that, however the Plaintiffs might be entitled to the injunction of this Court to protect them against a breach of Dr. *Granville's* agreement, and preserve to them their copyright in specie, the Defendants were not offenders within the penal clauses of the Statutes referred to, which clauses (as I understand them) suppose the unlicensed printing and publishing of a book previously composed and registered, and do not extend to the printing and publishing of a new work, although such printing and publishing might be a violation of the Plaintiff's rights, and an injury to his copyright in an existing work. I was told, however, and I do not understand the fact to be denied,—that the "Hand Book" is, to a great extent, a literal copy of that part of the Plaintiff's work which relates to *Bath*; and as to the rest, that it is merely what I may term colourable alteration of the same work. The question then arises,—whether, upon the fact which is now before me, the Plaintiff is entitled to the specific relief which he asks, on the ground that any of the Defendants is an offender within the penal clauses of the statutes for the protection of literary property.

I adverted in my former judgment to the differences which occur in the several statutes, not only in the nature of the offences which they specify,—in the amount of penalties, and in the [564] remedies for recovering them,—but also in the description of the property to be protected. In the Statute 8 Ann. it is books then composed and not printed and published, or hereafter to be composed; and in 54 Geo. 3, books composed but not printed or published, or hereafter to be composed *and* printed and published. These statutes, being in *pari materia*, are to be construed with reference to each other, and they are in their general provisions no doubt remedial, and therefore to be construed liberally, so as to suppress the mischief and advance the remedy; but so far as

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respects those clauses which are purely penal, it is clear that any party to be affected by them must be brought strictly within their operation. The Statute 8 Ann. creates a forfeiture, but leaves the Courts of Ordinary Jurisdiction to deal with it according to their ordinary principles. It is under the subsequent statutes, in which a Court of Equity is named, that this Court must interfere,—if it does interfere,—to give effect to the forfeiture. I cannot, for this purpose, in order to render the later statutes more stringent, import into them any part of the 8 Ann. which the legislature has not embodied in them (a). But, taking all these acts for the protection of literary property as they stand, I am of opinion, for the reasons I have already stated, that, whatever may be the liability of a party to an action for damages, or to an injunction, he does not become subject to these purely penal clauses, unless the work, the copyright of which has been invaded, had been registered as well as composed, at the time the act is done to which the penalty and forfeiture would attach.

*Applying this principle, in the first place, to the De- [*565]
 fendants *Simms & Son*, who have in their possession
 878 copies of the “Hand Book,” I have looked into the pleadings
 to see what the case before me is with respect to these points. There
 are some general allegations in the bill, but there is no statement
 of the time when the Plaintiff’s work was entered, and there is no
 evidence or admission in the answer of the time or times at which
 the Plaintiff’s book was composed, entered, or printed. The case
 in fact was evidently not framed with any distinct view to the point
 of forfeiture; and the result is, that there are not such facts before
 me as would justify me in deciding that the Defendants Messrs.
Simms are to be visited with the forfeiture as offenders within the
 act. The same observations will apply to the other Defendants;
 but as regards *Tilt & Bogue*, they are not now in possession of any
 of the copies, and Dr. *Granville* has one copy, which is not for
 sale.

(a) See *White v. Gereck*, 3 B. & A. 296, in which it was held, upon these statutes, construed with reference to each other, that the author of a book printed and published did not, by publishing the work before he printed it, lose his remedy, under the 54 Geo. 3, in respect of a piracy after it was printed.

 1843.—Attorney-General v. Lucas.

I do not see any ground for altering the decree which I have already expressed my intention to make. I may observe, that the claim which I have been called upon to consider is the right of the Plaintiff to enforce the extreme penalty which the law imposes in the most aggravated case,—a right which the absence of precedent shews to have been scarcely ever resorted to, and therefore not to be practically necessary for the protection of literary property.

[*566]

*ATTORNEY-GENERAL v. LUCAS.

1843. 27th and 28th March.

The husband charged with procuring his marriage with a minor, by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts relating to such charge, upon an information under the Marriage Act, (4 Geo. 4, c. 76, s. 23), seeking the forfeiture of his interest in the wife's property, and a settlement of the same upon her and her issue.

THIS information was filed under the Marriage Act, (4 Geo. 4, c. 76 (a)), at the relation of *R. Jago*. The information stated, that *Elizabeth*, the wife of the Defendant *Philip Lucas*, was the only child of the relator, and was an infant of the age of nineteen years: that on the 24th of August preceding, the Defendant *Philip Lucas* applied for and obtained a license for the solemnization of a marriage between himself and the said *Elizabeth*, and that on the 31st of August the marriage was solemnized by virtue of such license; that the license was procured by means of the Defendant *Philip Lucas* swearing, among other things, that the consent of the relator to such marriage had been obtained, whereas the Defendant well knew that such consent had never been given, but on the contrary, that the said marriage had been solemnized without the consent of the relator or his wife, (the mother of the said *Elizabeth*); and that the relator and his said wife had always objected thereto, alleging divers circumstances in evidence thereof, and in particular that the Defendant induced the said *Elizabeth* to leave the relator's house

(a) Sect. 23.

1843.—Attorney-General v. Lucas.

clandestinely, previous to and for the purpose of the said marriage : that the Defendant had in his possession various letters and papers, from which the truth of the said allegations would appear. The information alleged, that the said *Elizabeth* was entitled to certain real and personal property, expectant on the decease of the relator and his wife ; and it prayed a declaration that the Defendant *Philip Lucas* had forfeited all interest in such property, and that an account might be taken of all the property to which the said *Elizabeth* was entitled at the time of her marriage, and [*567] that the same might be settled under the direction of the Court for the benefit of the said *Elizabeth* and her issue. The Defendant *Philip Lucas*, by his answer admitting the marriage, insisted that he was not bound to answer whether the said *Elizabeth* was not a minor,—whether he did not obtain the license by swearing that he had the consent of the relator, or whether the marriage took place by virtue of such license, or whether the relator had always withheld his consent, or as to the circumstances stated as evidence thereof ; for the Defendant said that it appeared on the face of the information that the same was filed for the purpose of having it declared that he had forfeited his interest in the real and personal estate of the said *Elizabeth*, and of enforcing such forfeiture ; and further, that he was thereby charged with matters which would, if true, render him liable to an indictment and to punishment for misdemeanor.

Exceptions for insufficiency were taken with respect to the facts which the Defendant had so declined to answer. The Master reported the answer sufficient, and exceptions were taken to the Master's report.

Mr. *Roupell* and Mr. *Bilton*, for the informant.

This is one of the cases in which the Court has special jurisdiction by statute to give relief, notwithstanding that relief be the enforcing of a forfeiture ; *Attorney-General v. Mullay*(a). But this is not in the nature of a forfeiture, although nominally so : it is mere-

(a) 4 Russ. 329.

1848.—Attorney-General v. Lucas.

ly a preservation to, or a continuance in, the wife of her
 [*568] interest in her own property,—the object of the *information being to modify that interest by a settlement of it upon herself and issue: *Duplessis v. The Attorney-General* (a), *Wrottesley v. Bendish* (b), *Chauncey v. Tahourden* (c), *Lucas v. Evans* (d), *Chancey v. Fenhoulet* (e), *Fane v. Atlee* (g), *Lord Uzbridge v. Staveland* (h), *Smith v. Read* (i), *Boteler v. Allington* (k), *Bird v. Hardwicke* (l).

The rule, that a defendant shall not be compelled to answer with respect to the circumstances which might occasion a loss or forfeiture of property, applies only where that forfeiture is to be enforced at law; if the relief is to be given in equity, the defendant must answer, however prejudicial to his interests the answer might be: this is proved by the common practice of the Court, and the cases are consistent with it. The defence, on the alleged ground of the liability to punishment as for a misdemeanor, is answered by the fact that such liability does exist: *Rex v. Thomas Foster* (m), *Woodman's case* (n). There are some of the facts to which the objections to answer certainly do not apply.

Mr. Tinney and Mr. Heathfield, for the Defendant, cited *Claridge v. Hoare* (o), Beame's Pl. Eq., p. 263, *Orme v. Crockford* (p), *Monnins v. Monnins* (q); and contrasted the provisions in the act upon which the suit was founded with those of the acts 9 Ann. c. 14, s. 3, against gaming, and 7 Geo 2, c. 8, s. 2, against stockjob-

bing, which contain special provisions requiring an answer to be given. As to the separation of the *discovery, which might be harmless, from that which clearly led to forfeiture or penalty, they referred to *Paxton v. Douglas* (d). The Order XXVIII, of August, 1841, enabled the Defendant, by answer, to decline answering.

(a) 1 Bro. P. C. 415, Tom. ed.

(d) 3 Id. 200.

(h) 1 Ves. 56.

(l) 1 Vern. 109.

(n) 1 Leach, Cr. Ca. 64, n.

(p) 13 Price, 376.

(b) 3 P. Wms. 235.

(e) 2 Ves. 265.

(i) 1 Atk. 527.

(m) Russ. & Ry. Cr. Ca. 459.

(o) 14 Ves. 59.

(q) 2 Rep. in Cha. 36.

(c) 2 Atk. 393

(g) 1 Eq. Ca. Ab. 77.

(k) 3 Id. 453.

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VICE-CHANCELLOR :—

The object of the suit is to deprive the husband of property which he acquires in his marital right. A court of equity compels a defendant to give discovery generally in aid of the plaintiff's case ; but whatever the merits of this case may be, there are certain questions which the defendant is not bound to answer. Among these are questions the answers to which would involve the disclosure of privileged communications, and such matters as may subject the defendant to pains, penalties, and forfeitures. With respect to these questions it is perfectly immaterial whether the objection be taken by demurrer or answer: the defendant is equally protected. The thirty-eighth Order of August, 1841, therefore, has no application. That Order was not necessary in such a case: it was intended to provide for cases in which the defendant could not previously protect himself by answer. I think this case is not of that class in which the fact, the subject of inquiry, has been attended with a mere determination of interest by force of an original limitation, but that the present case is within the rule applicable to penalties and forfeitures, and that the Defendant cannot therefore be compelled to answer any of the interrogatories which are the subject of these exceptions.

It has been argued, however, that a different principle applies where the bill is for relief as well as discovery, *and the effect of the discovery is to be worked out in [*570] equity. This distinction is not to be found in any of the cases, and it appears to me to be unfounded in principle. I think I should be introducing an unmeaning refinement, if I decided that the same principle did not govern the case, whether the relief was at law or in equity.

Exceptions overruled.

 1843.—*Morley v. Rennoldson*.—*Morley v. Linkson*.

MORLEY v. RENNOLDSON.

MORLEY v. LINKSON.

4th, 19th, and 20th April, & 6th May.

The testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support, until she attained twenty-one, or married with the consent of his trustees under that age, and upon her attaining such age or her marriage, for her separate use with remainder to her children; and in case of her death without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards declared by a codicil, that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was that she should not marry, and in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder.

Held, that the limitation over by the codicil, being in general restraint of marriage, was void as to the life-interest of the daughter.

That the Court would not inquire into the fact of whether the testator was mistaken or not, with reference to his daughter's health or capacity.

Whether an interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil; *quære*.

The legatees of two-sixths of the residuary fund, expressed by the codicil to take in remainder in case of the marriage or death of the daughter, being out of the jurisdiction, the court made the declaration of right with respect to the other four sixths parts only.

W. RENNOLDSON, by his will dated the 4th of November, 1834, gave and bequeathed all his household goods and furniture, plate, glass, china, books, prints, and pictures, unto and to be equally divided between his wife *Emma* and his daughter *Margaret*; and he also gave to his said wife and Daughter *Margaret*, the sum of 150*l*. each for mourning, to be paid to them within two calendar months next after his decease; the said legacy to his daughter to be paid and applied to her use by his executors, if she had not then attained twenty-one. And he gave his leasehold house in Turner-street unto his wife, and directed that she should provide a [*571] *suitable apartment therein for the residence of his said daughter *Margaret*, so long as she should remain single and unmarried, and desired to live with his wife, to whose care he strongly recommended her. And he gave and bequeathed the residue of his personal estate to trustees therein named, upon trust

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to pay and apply certain sums for the benefit of his said wife and his daughter *Emma*, and the issue of his daughter *Emma*, and upon further trust to pay and apply all, or a competent part (in the discretion of his trustees) of, the residue of the annual proceeds of the trust monies, in the maintenance and support of his daughter *Margaret*, until she should attain twenty-one, or be married under that age with the consent of the said trustees, or the greater number of them in such manner as the trustees should think fit; and the remainder of such annual proceeds, from time to time, to be added to the principal; and immediately after his daughter *Margaret* should attain the age of twenty-one, or be married under that age with such consent as aforesaid, then upon trust to pay the interest and dividends of the said residue of the trust monies unto his daughter *Margaret*, for her sole use and benefit, without power of anticipation; and after her decease, he directed that the residue of the said trust monies should be in trust for all and every her child and children, as therein mentioned. And in case his said daughter should die without leaving any such child or children, he directed that his said trustees should stand possessed of the said trust monies, or so much thereof as remained undisposed of, upon trust to pay and transfer three fourth parts thereof unto his daughter *Emma*, and his nephews *William Rennoldson* and *John Dalton*, equally, and the other fourth part thereof unto his niece *Mary Harvey*, for her separate use.

By a codicil, dated the 15th of February, 1836, the testator revoked the last-mentioned ultimate bequest of [*572] the residue of his personal estate in fourths, in case of the death of his daughter *Margaret* without issue, and bequeathed one moiety of the same to his daughter *Emma*, and the other moiety to his said nephews and niece: and he appointed the Defendant *R. Linkson* executor and trustee, instead of one of the first-named executors, who was dead.

The testator made a second codicil, dated the 30th of October, 1836, upon which the question in the cause arose: this codicil was as follows:—"In consequence of the continued nervous debility under which my daughter *Margaret* is labouring, (originally occa-

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sioned by a fright at the age of five years), and considering that it totally unfits her for the control of herself, I deem it advisable, for better protection and of the several legacies and bequests to her by my said will, to direct that my trustees and executors shall apply all monies bequeathed to my said daughter for her use and benefit, in such manner as they shall think fit, and the most for her comfort and welfare, and my will and mind is that for the reason aforesaid my said daughter *Margaret* shall not at any time contract matrimony; and in case of the marriage or death of my said daughter *Margaret*, then I direct that the trustees and executors for the time being shall stand possessed of all the residuary stocks, funds, and securities, which I have bequeathed to her, as mentioned in my said will, and pay and transfer one half part thereof unto my daughter *Emma*, and the other half part thereof unto and equally between my nephews *William Rennoldson* and *John Dalton*, and my niece *Mary Harvey*."

The testator died in February, 1837, leaving all the [*573] said legatees surviving. The executors, *Morley*, **Sadgrove*, *Graham*, and *Linkson*, proved the will. After providing for the legacies, was a residue of about £5000. Three per Cent. Stock.

On the 9th of January, 1842, the testator's daughter *Margaret* intermarried with *R. Linkson*, one of the executors. The bill was filed by the other three executors to obtain the declaration of the Courts on the rights of the parties, as they might be affected by the marriage of *Margaret*, and that the trusts might be performed under the direction of the Court. The Defendants were the testator's widow, his daughter *Emma*, an infant, *R. Linkson* and *Margaret*, his wife, *William Rennoldson*, *John Dalton*, and *Mary Harvey* and her husband.

The Defendant *William Rennoldson* submitted, that the testator's residuary estate, on the marriage of his daughter, became payable to the other persons named in the second codicil: or if *Margaret* had not attained twenty-one when she married, and had married without the said consent, then that only a part of the interest of the residue ought to be applied for her benefit during her life or her mi-

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nority, or at all events that he was entitled to one-third of a moiety of the residue, in the event of the death of *Margaret* without children. The testator's widow, and his daughter *Emma*, an infant, submitted their rights to the Court. *John Dalton* and *Mary Harvey* and her husband were out of the jurisdiction, and did not appear in the cause.

The Defendants *R. Linkson* and *Margaret*, his wife, submitted that the second codicil did not operate as an alteration of the benefits given to *Margaret* and her children by the will; and the codicil was made when the testator was at a very advanced age, and suffering from acute disease, and under a "mistaken [*574] notion of the state of his daughter's health; and that neither then nor previously was she under any nervous debility unfitting her for the control of herself. They admitted that her health had been for a short time impaired by a fright when about five years old, but said that she very soon recovered from the effects of it.

Jane Linkson, a child of *R. Linkson* and *Margaret*, his wife, born after the commencement of the suit, was made a party by supplemental bill.

At the hearing—

Mr. *Teed* and Mr. *Rogers*, for the Plaintiffs.

Mr. *Romilly*, for the Defendants *Linkson* and wife, and their child.

The testator has by the codicil attempted to impose an absolute restriction on the liberty of marriage, and to fortify it by a penalty. This the law does not permit: *Low v. Peers* (a), *Hartley v. Rice* (b). It is not necessary to contend that a party may not in some cases create a valid limitation of property until marriage, or that he may not alter his bounty upon that event; but in all cases it is always a question of intention, whether the testator truly intends, on such an event, the benefit of the object in whose favour the legacy is limited over, or bona fide intends the simple performance of the condition, or whether his real object be to compel the celibacy of the

(a) 4 Burr. 2225; *S. C.*, *C. J. Wilmot's Cases*, 364.

(b) 10 East, 22.

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legatee. In the former case the limitation may be good, in the latter it is invalid. Thus, "when on any condition, however [*575] restrictive of marriage, the legacy is given over to *pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectional purpose of restraining marriage (a)." So, again, the testator may make the consent of another person to the marriage a lawful condition; but if he requires the consent of a person whose interest it is to refuse, or who would unreasonably refuse, the condition is void (b). The validity of every limitation until marriage depends upon the intention; and, if found to be in general restraint of marriage, there is no case in which the limitation in that respect has been upheld, except where the legatee was the testator's own widow: *Rishton v. Cobb* (c), *Keily v. Monck* (d), *Long v. Dennis* (e). In this case there is no room for argument, that any other purpose than restraint of marriage is intended: that is the express object and condition of the revocation. If it be argued that the restraint is to be supported as reasonable for the cause assigned,—the incapacity of the party,—as it would be held to be during infancy, the answer is that the incapacity is negatived by the fact, which is assumed on all sides, that the legatee has actually married. If she were under a mental incapacity, the marriage would be null, and the condition unbroken. The Defendant *Margaret* and her husband, however, deny the existence of any weakness of mind such as the testator intimates. If the opinion which the testator has expressed in his codicil be conclusive, it will be sufficient in all cases to express that opinion, and the principle against restraints on marriage becomes a nullity. If the language of the codicil be not conclusive on this question of fact and the question be itself material, assuming the capacity in the [*576] legatee to *contract marriage, then the Defendants are entitled to have the fact of the soundness and competency of mind of the legatee inquired into, and determined by the Court, before the validity of the limitation over be determined.

(a) Per Lord *Thurlow*, (*Scott v. Tyler*), 2 Dick. 722.

(b) Id. p. 720; *S. C.*, (*Scott v. Tyler*), Bro. C. C. 433.

(c) 9 Sim. 615.

(d) 3 Ridg. P. C. 205.

(e) 4 Burr. 2052.

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Mr. *Anderdon* and Mr. *Cripps*, for the Defendants *Emma Rennoldson* and *Emma Rennoldson*, the younger.

In the cases in which the condition has been held to have been void, as in restraint of marriage, there has been no gift over, and the condition was regarded as only in terrorem. The knowledge which the testator must have possessed of the state of his daughter's mind would qualify him to judge of her competency for self-control; and the reasonableness of the restraint has been always treated as the test of its propriety. The case, therefore, falls within the principles adverted to by Lord *Thurlow* in *Scott v. Tayler*, as supporting conditions, although, in effect, in restraint of marriage. There is no case in which so proper a restriction, as this must be allowed to be, has ever been considered invalid. The testator has given his daughter *Emma* a legacy, for a reason which he had assigned: the Court will not question the truth of the fact, for the purpose of depriving this Defendant of her legacy. Even if he were mistaken, the Court will not alter his will, for the purpose of rectifying the assumed mistake: *Smith v. Maitland* (a), *Kennell v. Abbott* (b), *Campbell v. French* (c). The utmost that *Margaret* can claim, supposing the condition to be construed as unlawful with respect to the restraint upon her, is the life-interest. There is no authority for the proposition that a party may not make the marriage of A. an event upon which property shall pass from B. to C.: that is no restraint on the marriage of A. The [*577] gift in remainder to the children of *Margaret* is therefore well revoked, and passes by the codicil to the legatees over in the case of her marriage.

Mr. *Toller*, for the Defendant *William Rennoldson*, in support of the like argument, cited, also, *Clarke v. Parker* (d) and *Malcolm v. O'Callaghan* (e). The limitation over takes effect upon breach of the condition. There is no principle upon which the Court can say that the parties claiming under the last limitation are to be excluded, merely for the benefit of those taking under the first,—one party being as much an object of the testator's bounty as the other.

(a) 1 Ves. jun. 362.

(b) 4 Ves. 802.

(c) 3 Ves. 821.

(d) 19 Ves. 18, 23.

(e) 2 Madd. 849.

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Mr *Romilly*, in reply, as to the alleged revocation of the gift to the children of *Margaret*, said that the expression in the codicil, importing the testator's intention that the legatee should forfeit her legacy on marriage, would not be construed to imply more than her own interest in it: the reason of the provision obviously went no further; and the same provision, in the case of her death, would be made intelligible and consistent with the will by reading it as death without issue. The testator would therefore be deemed to say, that, if his daughter married, she should lose her life-interest; if she died without issue, the capital should go over. The will and codicil must be taken together, and regard had to the principle, that a revocation, to be operative, must be as distinctly shewn as the original gift. *Doe d Hearle v. Hicks (a)*.

The following cases were also mentioned in the argument:—**Stackpole v. Beaumont (b)*; *Marples v. Bainbridge (c)*; *Bird v. Hunsdon (d)*; *Blackwell v. Bull (e)*; *Harvey v. Aston (f)*; *Gordon v. Gordon (g)*; *Powys v. Mansfield (h)*; *Doe v. Evans (i)*; and the following text-books—1 *Story's Equity Jurisprudence*, p. 229, s. 225; 1 *Jarman on Wills*, c. 27, s. 3, p. 836; 1 *Fonbl. Tr. Eq.* 259, n.

VICE-CHANCELLOR:—

The bill is filed by some of the executors, who are trustees, against the other trustee, who has married the testator's daughter *Margaret*, and against the other parties beneficially interested, or claiming to be interested, in the estate. The Plaintiffs suggest, that, in consequence of *Margaret's* marriage, a question has arisen, whether she is entitled to the income of the fund for her life, or whether her life-interest has not become forfeited, and vested in the ultimate legatees. The Defendants, Mr. *Linkson* and his wife, state by their

(a) 8 Bing. 475.

(b) 3 Ves. 88.

(c) 1 Madd. 590.

(d) 2 Swans. 342.

(e) 1 Kee. 176.

(f) 1 Atk. 361; *S. C.*, West, Rep. temp. Lord Hardwicke, p. 350. See cases there cited.

(g) 1 Mer. 141.

(h) 3 My. & Cr. 359.

(i) 10 Ad. & EL 228.

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answer, that, although the latter had suffered some time from nervous debility, yet that her health was perfectly restored, and they insist that the codicil is to be considered as merely in terrorem and of no effect. The whole question in the case arises between Co-defendants, and no other facts appearing, I simply have to determine upon the face of the will as it stands, what decree I ought to make.

The rule of the civil law was referred to in the argument, as it has usually been on questions of this nature [579] ture, but that law—founded, as Lord *Loughborough* observes (a), on social maxims and public policy, so essentially different from our own, as to render it difficult to conceive how it could have been adopted by our Courts on this subject—has not been followed with regard to conditions operating in restraint of marriage. The extent to which the civil law has been gradually departed from is to be collected from Lord *Thurlow's* judgment in *Scott v. Tayler* (b). In the *English* law a distinction has been taken between the cases in which the restraint operates as a condition precedent, and those in which it is expressed to take effect as a condition subsequent. A distinction has also been made as to whether it is a particular restraint, (a partial and reasonable restraint), or whether it is a general restraint; and the decision is generally made to depend upon the question, whether there is a gift over, or no gift over. In *Stackpole v. Beaumont* (c), Lord *Loughborough* appears to have said, that, such was the state of the authorities, a judge could not be considered to act too boldly whichever side of the proposition he should adopt (d). There are some points, however, which seem clearly settled, according to the law as administered in courts of justice in this country; one is, that, if the restraint is a general restraint, and the condition is subsequent, then the condition is altogether void, and the party retains the interest given to him, discharged of the condition; that is, supposing a gift of a certain duration, and an attempt to abridge it by a condition in restraint of marriage, generally the condition is, *prima facie*, void, and the original gift remains. But, until I heard the argument of this case,

(a) 3 Ves. 96.

(c) 3 Ves. 88.

(b) 2 Dick. 172.

(d) *Id.* 98.

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I had certainly understood, that, without doubt, where
 [*580] property was limited to a person until she married, and
 when she was married then over, the limitation was good.
 It is difficult to understand how this could be otherwise, for in such
 a case there is nothing to give an interest beyond the marriage. If
 you suppose the case of a gift of a certain interest, and that interest
 sought to be abridged by a condition, you may strike out the condi-
 tion, and leave the original gift in operation; but if the gift is until
 marriage, and no longer, there is nothing to carry the gift beyond
 the marriage. With reference to that point, and also in order that
 the grounds of my decision might clearly appear to those parties
 against whom it might be, I wished to look into the authorities; and
 I am satisfied, from an examination of the authorities, that there is
 no reason to alter my opinion, that a gift until marriage, and when
 the party marries then over, is a valid limitation. In the case of a
 widow there is no question of the validity of such a limitation. It
 was decided in *Jordan v. Holkham* (a), that, where an estate was
 given during widowhood, the estate was determinable by the second
 marriage; and an annuity given during widowhood is also good.
Barton v. Barton (b). In *Scott v. Tayler* (c), Lord Thurlow,
 speaking of the change which the civil law had undergone in its
 descent, observes that, in the novels, widowhood was excepted, and
 an injunction to keep that state was a lawful condition (d). *Scott*
v. Tayler was certainly a peculiar case; but, referring to the canon
 law, Lord Thurlow, citing *Godolphin*, says, that the use of a thing
 may be given "during celibacy, for the purpose of intermediate
 maintenance, and will not be interpreted maliciously to a charge
 of restraining marriage" (e); affirming, therefore, the
 [*581] general doctrine, that a gift until marriage would be
 good. In the case of *Low v. Peers* (f), Chief Justice
Wilmot goes through the cases upon the subject, and shews that,
 according to his apprehension of the law, a gift until marriage is
 perfectly good. He notices the case of college fellowships, of
 customs of manors, of limitations of estates during celibacy, and

(a) Amb. 209.

(b) 2 Vern. 808.

(c) 2 Dick. 712.

(d) Id. 721.

(e) 2 Dick. 722.

(f) C. J. Wilmot's Cases, 369.

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the express distinction between limitations and conditions; and he remarks, that that distinction is recognized and established, and that the common law allows it. I may refer to the cases, and amongst them to the later one of *Bird v. Hunsdon* (a), and *Marples v. Bainbridge* (b), as affirming the same proposition. In those cases all the reasons the Court referred to were superfluous, if a limitation during celibacy is not good. The Court might have taken the short course, and have said that it was in the nature of a restraint, and therefore could not be supported. I wish to exclude the supposition, that I proceed, in any respect, upon the ground taken in argument upon this point.

The question to be considered is that upon which, in fact, I reserved my judgment,—whether, according to the true intent of the second codicil, it must be considered as confirming the gifts made by the will, and then seeking to determine them on the event of marriage, or whether it was not a complete substitution of new bequests, amounting, in substance, to a limitation during celibacy. Without saying the case is clear, the conclusion to which I have come is, that this codicil does, in point of fact, recognise and confirm the prior bequests by the will. The testator does not intend to say, “I substitute a new bequest,”—but he says, “It is advisable for her better protection, as to the several legacies and be- [582] quests to which by my will she is entitled, to direct that my trustees shall apply the money in a certain way.” He then proceeds to say his will is, that she shall not, for the reasons he has mentioned, contract matrimony; and that, in case of her marriage or death, the residuary stocks, funds, and securities which he has bequeathed to his daughter, as mentioned in his will, shall go over to other parties. That is the next clause. In the case of *Malcolm v. O’Callaghan*, which was cited, marriage with consent was a condition precedent, by the will, and the codicil giving the legacy to the survivor of the daughters who should die before the age of twenty-five, or marriage with consent, was held to keep alive the condition.

The testator in this case has so expressed himself, as to import an

(a) 2 Swans. 342.

(b) 1 Madd. 590.

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intention to create a general restraint upon the marriage of the legatee, and the limitation over, with that object, is therefore, *prima facie*, void. I need not repeat the cases on this point, the last of which (*Rishton v. Cobb* (a)) is a very important one, although there were some words in that case which might be open to observation.

The only other point upon the face of this case is, whether circumstances may not exist, justifying the testator in prohibiting his daughter altogether from contracting marriage, notwithstanding the general rule I have mentioned. Although, upon this will and codicil taken together, the testator says that the state of mind of his daughter totally unfits her for the control of herself, it is impossible to read the will, made in 1834, and the codicil, made in 1836, in the latter of which the testator does not speak of any new fact having occurred, but of continuous debility, produced by an [*588] antecedent cause, without seeing that on the face of the will he admits a capacity in his daughter to contract marriage. He supposes it in 1834,—he supposes the same state to continue at the time of making the codicil; and on that supposition it is that he thinks it necessary to interpose, and provide by his will that she shall not contract marriage. Upon the face of these instruments there is a recognition, therefore, by the testator, of a capacity on the part of his daughter to contract marriage; and, therefore, taking the case as unencumbered with any other facts, it seems to me, that I cannot do otherwise than hold that this is a conditional gift in general restraint of marriage, by which the testator seeks to cut down an interest which he had given by the will, and therefore that I must hold this to be a void condition. Attending, however, to the qualification which I must annex to the decree in respect of the interests of the absent parties,—to the fact, that this is a case between co-defendants,—and to the suggestion, that if the truth of the case was before the Court, it might receive a different consideration, all I at present decide is, that, simply reading the will, in a case in which there has been no opportunity for con-

(a) 9 Sim. 615.

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test between the co-defendants with respect to extraneous circumstances, I am of opinion that the condition is invalid.

There were other parts of the case argued, which I do not think it necessary to decide, and which I notice only to exclude them, as I would most emphatically do, from being considered to form any part of the grounds of my judgment. It was said that this was a case of mistake on the part of the testator. I cannot advise the parties—on the contrary, I think it would be idle for them to attempt to found any case upon such a supposition as that of there being any mistake in the testator's mind with [*584] respect to the competency or incompetency of his daughter for marriage. I could not hold the codicil void on the ground of such mistake, supposing it to be proved. Although I admit that mistake may be a ground for equitable relief, this is a case, in which a party having the object of his bounty before his eyes, thinks proper to form his own opinion on her fitness for a certain state of life, and, forming that opinion, he declares that she ought not to marry; and if she does, he directs that the bounty which he intended for her should go to others. If he could by law impose such a restraint, I cannot inquire into the soundness of the judgment which led him to do so.

I was asked to decide also the case as to the children. In the decree I intend to make, the case of the children will incidentally be noticed. I give the income to *Margaret*, with liberty to all parties to apply. The case of the children of *Margaret* may stand upon a different footing from that of *Margaret* herself. Suppose the testator had said, "I have given my daughter a life-interest, and I have given A. B., a stranger, the remainder; but now I do not choose that my daughter shall marry, and if she do marry, I revoke the bequest to A. B." Is it quite clear that the revocation would not be effectual as to A. B., although, as to the daughter, the attempt to revoke the legacy, on her marriage generally would be void? Here the testator says his daughter ought not to marry, and she shall not marry; and he has given the property, after her marriage or death, to other parties. I will not decide, in this stage of the case, in what way, if at all, the interests of the children of

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Margaret may be affected by the condition, which is inoperative as regards the interests of *Margaret* herself.

[*585] *As to the form of the decree,—This bill being filed by trustees, I must treat the Co-defendants as making claims adverse to each other, and avoid anything which might endanger the interests of the absent parties. *Emma Rennoldson*, who would take half of the residue given over by the codicil, and *William Rennoldson*, who would take one-sixth, are before the Court; and therefore the decree which I propose to make will properly bind the four sixth parts of the residue that would pass to them. The parties who would be entitled to the other two-sixth, namely, *John Dalton* and *Mary Harvey*, are out of the jurisdiction. The decree must be guarded with reference to this portion of the residue. The case of *Stevenson v. Anderson* (*a*), before Lord *Eldon*, may seem to throw a doubt upon the necessity for this caution: that was a case of interpleader; and only one of the suggested claimants of the property was before the Court, the others being out of the jurisdiction: the Court granted an injunction, (which I should have no difficulty in doing in this case, if any injunction were needed) (*b*); and Lord *Eldon* said, that, the Court having proof that the plaintiff in interpleader had done all he could to bring the parties before the Court, and had not succeeded, the consequence would be, that the only person within the jurisdiction must have that which was represented as the subject of competition, and the Court would indemnify the interpleading party against those who were out of the jurisdiction. Many reasons apply to that case which do not apply here. Where the remedy of the claimant is against the bailee personally, the Court places that claimant in no worse situation by making its declaration upon the case which the bailee presents to

[*586] the Court (*c*). *The case is different where the Court is disposing of a fund under its control. In such a case I cannot allow the money to be received by the parties before the Court, saving the rights of those who are absent; for the decree to

(*a*) 2 V. & B. 407.

(*b*) See *Chambers v. Bicknell*, ante, p. 540.

(*c*) See ante, vol. 1, p. 296.

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that effect would prejudice their rights if it were erroneous. It would deprive them of the security of the fund itself. The utmost which I think I can do, is, to secure the fund in which the absent parties are interested. There are several provisions in this will which may yet remain in operation, upon which I am not now called to give any opinion. The funds will be brought into Court, and the dividends, to which Margaret is declared to be entitled, will be directed to be paid to her.

DECLARE, that, as against *Emma Rennoldson*, the younger, and *William Rennoldson*, such interest as the Defendant *Margaret Linkson*, late *Rennoldson*, took under the will of *William Rennoldson*, the testator, in the pleadings, &c., did not determine by force of her marriage with the Defendant *Robert Linkson*, in the pleadings mentioned; but this declaration is to be wholly without prejudice to the rights (if any,) of the Defendants *John Dalton* and *Mary Harvey*, who are out of the jurisdiction of this Court, and without prejudice to any right of the Defendants *Emma Rennoldson*, the younger, and *William Rennoldson*, to file a bill to establish their rights (if any) in the residue not inconsistent with the above declaration, and refer it to the Master of this Court, in rotation, to inquire and state to the Court what children there have been of the marriage of the said Defendants *Robert Linkson* and *Margaret*, his wife and whether any of them are since dead; and if the said Master shall find that all the surviving children of the said marriage are before the Court, parties to these suits, then let it be referred to the said Master to take an account of the personal estate not specifically bequeathed of the testator, &c. Plaintiff, and Defendant *R. Linkson*, to transfer and pay (*the several parts of the trust funds*) into Court, in trust in these causes. [Directions with respect to the payments to be made to the Defendants *Emma Rennoldson* and *Emma Rennoldson*, the younger.] And let four-sixths of the dividends that have accrued due on the said [describing the residuary trust funds] previously to the transfer thereof as aforesaid, and which may be paid into Court *pursuant to this order, and of the dividends hereafter to accrue [*587] due thereon, when so transferred, be paid to the Defendant *Margaret Linkson*, for her separate use, and on her sole receipt, until the further order of this Court, but without prejudice to the payment of the costs of this suit. Liberty generally to apply.

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GRIFFITHS v. GRIFFITHS.

1843 : 3rd, 4th, and 20th April.

Where a party has employed, as his solicitors in a cause a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to his new solicitor, upon the usual undertaking for saving the lien of the discharged solicitors.

THE petition of the Plaintiff, *Elizabeth Jane Griffiths*, an infant, by *W. Fallowfield*, her next friend, stated, among other things, that, it having, in 1840, been determined by *George Gordon* and *Susan*, his wife, two of the Defendants in the cause, (*Susan* being the mother and testamentary guardian of the petitioner), that the petitioner should be made a ward of Court, and a suit instituted on her behalf, the said *George Gordon* applied to *W. Fallowfield*, and requested him to act as such next friend, which he consented to do, and accordingly signed a written authority, prepared by Messrs. *Gregory & Cook*, the solicitors of the said *George Gordon*, authorizing them (Messrs. *Gregory & Cook*) to use his (*W. Fallowfield's*) name as the next friend of the petitioner in the cause: that this suit was thereupon commenced and various proceedings had, as thereby stated. That Messrs *Gregory & Cook* had recently dissolved partnership, and on the occasion of such dissolution some arrangement had been made between them, whereby this suit, and the further prosecution thereof on behalf of the petitioner, had been attempted to be assigned or given over to Mr. *Cook* alone, and that Mr. *Gregory* had since ceased to conduct the same or interfere therewith. That, on the 15th of March, 1843, *W. Fallowfield* moved this Court that he might be at liberty to change his solicitor in this cause, by appointing Mr. [*588] *George Hume* as such *solicitor, in the place and stead of Messrs. *Gregory & Cook*, and which was ordered accordingly: that under and by virtue of such order, and which had been duly served in pursuance of the general order of this Court in

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that behalf (a), Mr. *George Hume* had been duly substituted for the said Messrs. *Gregory & Cook* as the solicitor of *W. Fallowfield* the next friend of the petitioner in this cause, and proper notice required in that behalf had been given to the clerk of the records and writs of the Court. That Mr. *George Hume*, by the authority of *W. Fallowfield*, had applied to Messrs. *Gregory & Cook*, and requested them to deliver up the papers in this cause held by them as theretofore such solicitors as aforesaid, but Messrs. *Gregory & Cook* had refused to deliver up the same unless their bill of costs was first paid.

The petitioner therefore prayed that Messrs. *Gregory & Cook* might respectively be ordered, within a week from the date of the order to be made on the petition, to deliver up on oath to Mr. *Hume*, the present solicitor of the said *W. Fallowfield*, as the next friend of the petitioner, all briefs, office copies of answers, cases for the opinion of counsel, opinions of counsel, and all other papers and writings whatsoever in or connected with this cause, in the possession or custody of Messrs. *Gregory & Cook* or either of them as the solicitors or solicitor, of the petitioner, or of *W. Fallowfield*, as her next friend in this cause, which upon inspection Mr. *Hume* might deem necessary on behalf of the petitioner on the hearing of this cause, the said Mr. *Hume* undertaking to receive and hold all such papers and writings without prejudice to any right of lien thereon to which Messrs. *Gregory & Cook*, or either of [*589] them, were, or was, or might be entitled, and to return the same undefaced to Messrs. *Gregory & Cook* within fourteen days after the hearing of this cause.

Mr. *Roupell* and Mr. *Lloyd*, for the petition.—The retainer was given to the parties jointly: by the dissolution of their partnership, under which one party ceases to act in the cause, the solicitors, in effect, discharge themselves; and the client is entitled to treat them in the same manner as solicitors who have been discharged by their own voluntary act, and not by the act of their client: *Earl of*

(a) See Order XVIII. of the 26th of October, 1842.

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Cholmondeley v. Lord Clinton (a), *Cooke v. Rhodes* (b), *Colegrave v. Manley* (c), *Heslop v. Metcalfe* (d), *In re Smith* (e).

Mr. Temple and Mr. Toller, contra.

None of the cases go so far as to decide that the mere retirement of one partner of several solicitors puts an end to all the retainers given to the partnership before the retirement. Such a principle would be extensively prejudicial. The cases in which the papers have been ordered to be delivered up are cases in which the solicitor refused to prosecute the suit, or where the conduct of the solicitor has been such as to render it impossible that the client can continue to trust him. Neither of these cases occurs here.—*Lord v. Wormleighton* (f), *Twort v. Dayrell* (g).

VICE-CHANCELLOR:—

[*590] I take the law of the Court in the abstract to be "free from doubt. If a client discharges his solicitor, the Court does not take the papers from the latter, unless upon payment of his bill. If, on the other hand, the solicitor discharges himself, then according to the decision in *Heslop v. Metcalfe* (h), the Court will compel him to give over the papers to the new solicitor, saving his lien upon them. There was a doubt before that case, whether the rule was to allow a new solicitor, on behalf of his client, to inspect papers in the hands of the old solicitor, and take copies of them, or whether the papers were to be delivered over. Lord Cottenham, in that case, made an observation, the force of which every one must feel, that the only effect of obliging the new solicitor to take copies is to put the client to expense, without any benefit to the old solicitor; for, when the copies are taken, nothing more is wanted. The case of papers in a cause is different from that of

(a) 19 Ves. 261.

(b) Id. 273, n.

(c) 1 T. & R. 400.

(d) 3 Myl. & Cr. 183.

(e) 4 Beav. 309.

(f) Jac. 550.

(g) 13 Ves. 195.

(h) 3 Myl. & Cr. 183.

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deeds, which have an intrinsic value, that cannot be imparted to copies.

The question I have here to try, is, whether the dissolution of the partnership operates as a discharge of themselves by the solicitors, or a discharge of the solicitors by their client. I do not see any other question. With regard to the dissolution of partnership, it seems to me, that I am simply to apply to this case, as between solicitor and client, what Lord *Eldon* manifestly, in *Cholmondeley v. Clinton* (a), applies to every species of contract between man and man. Where a person employs two solicitors, who are partners, Lord *Eldon* says, in that case the client stipulates for the activity and services of both: that is his contract. Apply that to a contract of any kind. A man contracts with two persons to do a certain thing; suppose one of those persons subsequently to refuse or incapacitate himself "from acting in the business [*591] against the will of the other; that I will suppose might raise a question as to the position of the other; but if the withdrawal of one partner from his contract has taken place by arrangement between the two, for purposes of their own, can any obligation to one alone remain upon the party with whom the two made the contract? Is he to rely on the responsibility of one alone? The argument for Mr. *Cook* has been, that the two partners were retained,—that Mr. *Gregory* has retired, and that his retirement only has led to this application for the papers. When one party retires, I ask, as Lord *Eldon* did, in *Cholmondeley v. Clinton*, what is the client to do? He cannot have the services of both: he must have the services of one, or of none; but he never consented to trust his affairs to one alone. If the continuing partner, for his private purposes, has consented to the retirement of the other,—as is admitted to have been the case here,—the question, whether he was the party principally employed or not, makes no difference. If the proposition be put, as I incline to think it must be, that the solicitors have discharged themselves, how can one of them say he has nevertheless a right to continue the solicitor for the party? He has voluntarily, for purposes with which the client had nothing to do, and of which he knew nothing, thought fit to come to an ar-

(a) 19 Ves. 261.

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rangement with his co-partner, by which the client has been deprived of the benefit of part of his contract, the services of that co-partner. If the continuing partner can say that he has a right to insist upon being the solicitor of the client of the two, the consequence would be that the client must, whether he confides in the continuing or not, continue to employ him, or relieve himself from such an obligation by paying his bill of costs, and this where it is not by his own act, but by the act of the solicitor, that his situation has been so materially altered. What I have to consider is, whether the [*592] solicitors, notwithstanding their own acts have changed the relative situation of their client and themselves, have yet a right to say at any given moment, "You must pay the bill of costs, or you shall not have the papers." That they may not be bound to go on and incur further costs, is another proposition; but that they may not retain the papers from the client where they have discharged themselves, if such be the case here, is the very point decided in *Heslop v. Metcalfe*. My present impression is, that, where there are two solicitors, and they choose to dissolve their partnership, one, or perhaps he that was principally trusted by a client, retiring from the firm, the remaining partner can have no right to say, "I will lock up the papers and not let the client use them, unless he will employ me alone as his solicitor." The consequence seems to me to be, that to some extent these papers must be made available to the petitioner.

VICE-CHANCELLOR:—

The law of the Court, as I stated at the conclusion of the argument, is perfectly settled; that, if a party discharges his solicitor by his own arbitrary act, he cannot obtain from that solicitor even an inspection of papers in his hands, much less a delivery of them up for the purposes of the cause, without paying the solicitor's bill. If, on the other hand, the client is discharged by the solicitor, the rule is the other way. It is unquestionably clear in that case, that the client has a right to have an inspection of the papers to an extent necessary to enable him to carry on the cause in a con-

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venient manner,—“with as much ease and celerity,” to use Lord *Eldon*’s expression in *Colegrave v. Manley* (a), as if the solicitor had not discharged him. According to the earlier cases, it appears to have been held that all “which the client was [*593] entitled to was the inspection of the papers in the hands of the solicitors. In the case of *Colegrave v. Manley*, an order was made, which in terms gave the client who was discharged by his solicitor the possession of the documents, undertaking to return them to the first solicitor. Notwithstanding that case, it was not until *Heslop v. Metcalfe* (b), that the point was considered to be settled, that the client would have a right to the possession of the documents upon an undertaking to return them. In the latter case, Lord *Cottenham*, referring to *Colegrave v. Manley*, said, that the principle was, that the client must be able to carry on his case with the same ease and celerity, and as little expense, after his solicitor had discharged himself, as before; and he made an order in the terms asked by this petition. I do not understand Lord *Cottenham* to have laid down an absolute rule with regard to the form of the order, but only to have held, that the mere circumstance of the change of the solicitor is not to be made the occasion of depriving the client of those facilities for the conduct of the suit, which he had before the connexion between him and his solicitor was dissolved; and upon this principle the Court will make such an order as *prima facie* appears to be the most beneficial to the client, not disregarding the protection of the solicitor, and the order would commonly be as in *Heslop v. Metcalfe*, unless it be shewn by the solicitor that the delivering up of the papers is practically unnecessary.

The question is brought to this, whether I am to consider Messrs. *Gregory & Cook* not as discharged by their client, but as discharging themselves, in which case the order will be in the terms of the prayer of the petition. Now, if I am to look at the case upon “principle, it seems impossible to entertain a doubt up- [*594] on it. The retainer in this case was given to the two partners. The affidavits on the part of the solicitors in terms state

(a) 1 T. & R. 402.

(b) 3 Myl. & Cr. 183.

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that fact. It appears that the two did to some extent act in the business of the cause, but unquestionably Mr. *Gregory* was the acting solicitor. Of that there is no doubt. In a letter in which he recommended Mr. *Cook* as a man of talent, and one who could be safely trusted to carry on the cause, he took credit to himself for having, as he says, "with great labour and much anxiety, got the whole of it up." I do not, however, think this material to the application, for, if the retainer was given to the two, and one thinks proper to retire, I think the principle of law is the same, whether the retiring or the continuing partner happened to be more or less conversant with the particular business. I notice it only to shew how important it is that the principle should be observed. It often happens that a partner retiring assigns his business to a clerk in whom he has great confidence, but his clients may have no confidence whatever; or a party may have continued his business with a firm of more than one partner, solely from the confidence he had in an elder partner, or member of the firm, whom he has always trusted. If that partner might retire, and insist that the person whom he had taken into the business, or the partners who were left in the business, but whom the client had not trusted, should alone have the conduct of that client's affairs, it would enable him materially to alter the relation of the parties, without the consent of the party most interested. It seems to me, the agreement between the two solicitors, that the partnership shall be dissolved, being made for their own benefit without any communication with their client, the moment one of them retires he has discharged himself, and the relation of attorney and client is dissolved between them.

[*595] Now "in this case Mr. *Gregory* discharged himself, and thereupon the retainer which was given to the two is gone altogether and the client is left at liberty either thenceforward to employ the continuing partner, or to take a new solicitor. In either case it is, in substance, a new retainer. Upon principle, as I have said, I have no doubt upon the subject. If, instead of considering it on principle, I refer to what Lord *Eldon* said, in *Cholmondeley v. Clinton* (a), it is impossible not to see that it was his opin-

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ion also. He is represented as saying, in effect, that the better course for the client was to continue to employ the partner who remains ; yet the whole of his reasoning shews, in such a case he considered the solicitors to have discharged themselves, and not to have been discharged by their client, and that the client has, in truth, to give a new retainer. In *Re Smith (a)*, Lord Langdale held that *Smith* had so acted as made it impossible that his client in the country could trust him any longer ; and, as it was by the act of *Smith* that the other parties were obliged to discharge him, that he must be considered, for the purpose of the application, to have discharged himself, and his lien to be dealt with accordingly. *Redfearn v. Sewerby (b)* is an important case : there the solicitor died, and the question was, whether the client must pay the bill of costs before he obtained possession of the papers. And Lord Eldon takes this distinction : he says, the proceedings are stayed by the act of God, and not by any default of the party, and he could not say that the client could take the papers out of the hands of the solicitor's representatives without first discharging the lien,—indirectly affirming the proposition, which indeed common sense would dictate, that where the connexion is broken off by the voluntary act of the solicitor, the Court will hold that the solicitor dis- [*596] charges himself ; which is, in truth, the obvious effect of his act.

Being therefore of opinion, upon principle, that the retirement of Mr. *Gregory*, in this case, had the effect of discharging himself and Mr. *Cook* as solicitors in this cause, and thinking that this opinion is also supported by the authorities, so far as they go, although I can find no case which is precisely similar, I must hold that Mr. *Fallowfield* is entitled to the benefit of the rule applicable where the relation of solicitor and client is terminated by the act of the solicitor, and that, therefore, he is entitled to have the papers delivered up to the new solicitor, upon the terms mentioned in the prayer of the petition.

(a) 4 Beav. 315.

(b) 1 Swanst. 24.

1843.—Martin v. Norman.

MARTIN v. NORMAN.

1843 : 30th March.

The traversing note, filed and served under the 21st Order of August, 1841, has the same effect as an answer, in traversing the whole of the bill; but it has not, for the purpose of evidence, the same effect as an answer upon oath.

The bill stated that the Plaintiff offered a freehold ground-rent for sale by auction, in September, 1842, and the Defendant, *Sarah Norman*, by her agent *Curling*, became the purchaser, the said agent paying the deposit, and signing the memorandum of agreement, therein describing himself as the agent of *B. Thompson*: that *Curling* afterwards declared himself to have made the purchase for the Defendant, and that he, being also the solicitor of the Defendant, had accepted the title and approved the draft conveyance on her behalf: that on an application by the solicitor of the Plaintiff to the Defendant, the latter had, in effect, admitted that *Curling* had been her agent and solicitor in the transaction, but she had not complied with the repeated requests of the Plaintiff's solicitor, that the purchase might be completed. The bill prayed a specific performance of the contract.

[*597] *The Plaintiff filed a traversing note, under the Order XXI. of the 26th of August, 1841, and served a copy of such note on the Defendant.

The Plaintiff then went into evidence, and proved by his solicitor the offer for sale by auction,—the conditions,—the signature of *Curling* to the memorandum,—the delivery of the abstract,—and the acceptance of the title. His solicitor also produced and proved the engrossment of the conveyance to the Defendant prepared by *Curling*; and he proved that he had made application to the Defendant to complete the purchase, and had received a letter in answer to such application from *Morris*, a second solicitor of the Defendant, on her behalf, imputing to *Curling* the blame of having delayed the completion of the business. At the hearing,

Mr. *Wood* and Mr. *Hibbert*, for the Plaintiff, asked for the com-

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mon decree. They cited *Maclean v. Dunn* (a), on the point that subsequent recognition of the contract was equivalent to a prior authority. The agency of *Curling* might be proved by evidence dehors the written agreement: *Taylor v. Salmon* (b).

Mr. *Temple*, for the Defendant, said that the note had, by the express terms of the 21st Order of 1841, "the same effect as if the Defendant had filed an answer, traversing the whole of the bill;" and he insisted the consequence was, that the agreement, the agency of *Curling* and of *Morris*, and every other fact alleged in the bill, must be taken as denied; and none of such facts being proved by the oath of more than one witness, the Court, on its ordinary rule of giving credit to the answer, unless contra- [598] dicted by more than one witness, could not therefore make the decree: *Alam v. Jourdan* (c).

VICE-CHANCELLOR :—

I think this is the first cause which has come before me upon a traversing note. Until the 21st Order of August, 1841, came into operation, the Plaintiff had no alternative but to proceed against the Defendant, with a view of enforcing an answer, or of taking the bill pro confesso on default, even supposing he was satisfied that the answer, if obtained, would be of no value, either from the Defendant being a stranger to the facts upon which the equity of the bill was founded, or from other causes. It was thought right, in this respect, to place a plaintiff in equity in the same situation as a plaintiff in a court of law, in an undefended cause, where he is left to make out his claim by such evidence as he can adduce. It does not, however, follow, that the case is to be considered, for all purposes, as if the defendant had put in an allegation upon his oath, denying the facts stated in the bill. The rule, as it has been stated in the argument, no doubt is, that where the oath of the party in his answer is in direct conflict with the evidence of a single witness, and that evidence is not corroborated by any circumstances, the

(a) 4 Bing. 722.

(b) 4 Myl. & Cr. 134.

(c) 1 Vern. 161.

 1843.—*Martin v. Norman.*

Court will give so much credit to the answer as to refuse to interpose. The oath of the Defendant, denying the title of the Plaintiff to equitable relief, is, in such a case, held to countervail the testimony of the witness: there is such a balance of evidence that the Court leaves the parties in the situation in which the law places them. The traversing note cannot be considered as having [*599] ing this effect: it admits nothing, but it does not meet the Plaintiff by any thing countervailing his evidence. The Court has not the oath of the Defendant to set against the testimony brought forward by the Plaintiff; and the Defendant, in permitting the cause to stand in such a position, having had the opportunity of answering, must be taken as deliberately declining to pledge his oath to a different statement of facts from that which appears on the bill, and is proved by the evidence in the cause. Here the Defendant has not, therefore, the benefit of the principle which might have operated in his favour, if he had put in his answer, denying the case of the Plaintiff.

[His Honor then stated the evidence, and concluded that the Plaintiff had proved the agreement, and was entitled to the decree, with costs.]

This cause coming on, this &c., to be heard and debated before this Court in the presence of counsel learned on both sides, and upon opening the Plaintiff's bill and hearing a certificate of the Clerk of Records and Writs that the Plaintiff filed his traversing note pursuant to the 21st General Order of the 26th of August, 1841, on the 13th of September, 1842, an affidavit of the due service of such note on the Defendant, *Sarah Norman*, and &c., [Conditions of sale. Memorandum of agreement for &c., dated the 9th September, 1840. Indentures of lease and release, bearing date respectively the — 1841, and purporting to be made between the Plaintiff of the one part and the Defendant of the other part. Letter from the Plaintiff's solicitor to the Defendant 22nd of April, 1842. Letter from the Defendant's solicitor to the Plaintiff's solicitor, 26th of April, 1842], read,—and what was alleged by the counsel on both sides, this Court doth declare the Plaintiff entitled to a specific performance of the agreement in &c. And it is ordered that it be referred to the Master &c. to take an account of what is due in respect of the purchase-money for the hereditaments and premises comprised in the said agreement, and to calculate interest thereon at &c., from &c., according to the conditions of sale. And it is ordered that the said

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Master do also take an account of the rents and profits, if any, of the said hereditaments and premises received by the Plaintiff since &c., or *which [*600] without his wilful default, might have been so received. [Rents to be deducted from principal and interest as aforesaid.] And it is ordered that the balance be paid by the Defendant, *Sarah Norman*, to the Plaintiff: and thereupon it is ordered that the Plaintiff do execute all proper conveyances of the said hereditaments and premises, and deliver over all deeds and papers relating thereto, upon oath, to the said Defendant or to whom she shall appoint, having regard to the conditions of sale; such conveyances to be settled by the Master in case the parties differ. And, with respect to such conveyances and delivery of such deeds and papers, it is ordered that the said Master do have regard to the said conditions of sale. And for the better taking &c. [Usual directions for production of papers—examination of parties—just allowances.] Plaintiff's costs to be taxed, and paid by the Defendant, *Sarah Norman*.

MANSER v. JENNER.

30th March, 3rd April.

Affidavits filed after the answer cannot be read on motion for a special injunction, in support of which no affidavits had been filed before the answer; and the rule is the same whether notice of the motion was given before the answer was put in or afterwards.

THE bill was filed in December, 1842, praying that the partnership between the Plaintiff and the Defendant might be dissolved, the accounts taken, and the Defendant in the meantime restrained from getting in the outstanding debts, and from withholding the books and papers. On the 4th of March, 1843, the Plaintiff gave notice of motion, for the 16th of March, for an injunction to restrain the Defendant from retaining the partnership books and papers in his own possession, out of or away from the office of the partnership. The answer came on the 8th of March. On the 16th of March, the counsel for the Plaintiff saved the motion until the next ensuing seal day. On the 27th of March, the Plaintiff gave notice that he should read as an affidavit on the motion the answer which he, (the Plaintiff), in September, 1842, had put in to a bill filed by the Defendant against him for dissolution of the same partnership, and on the same 27th of March, the Plaintiff filed other affidavits in support of

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the motion. The motion was made on the 80th of March. The affidavits being tendered,

[*601] *Mr. *Roupell* and Mr. *De Gez* objected to their admission.

The rule is, that, after the answer is in, the Plaintiff, who then comes the first time for the injunction, must rely upon the answer, and cannot support his application by affidavits: *Smythe v. Smythe* (a), *Jefferys v. Smith* (b), *Bouldington v. Woodley* (c), *Lloyd v. Jenkins* (d). The answer came in regularly in due time. It is not a case where, from any delay in making the motion, the Defendant has taken an advantage, as in *Morphett v. Jones* (e), or *Atkinson v. Kemble* (g).

Mr. *Simpkinson* and Mr. *Lloyd*, for the motion.

The coming in of the answer does not deprive the Plaintiff of the right which he had when he gave the notice of motion, to file affidavits; his right, in that respect, must stand on the same footing as it did at that time. The motion must be determined on the state of facts then existing, and upon facts which have subsequently happened, and which, if they had occurred before, would probably have induced the Plaintiff not to make this motion: this is a common principle. If, for example, a motion is irregular when made, it is not cured by anything that afterwards happens. If a plaintiff gives notice of motion to dismiss before he is entitled to do so, the motion does not become regular because the time has arrived when it is brought on: *Kershaw v. Matthews* (h).

[VICE-CHANCELLOR:—You have had the right of filing [*602] affidavits when your notice was given, but you did not exercise that right. I must try the propriety of the motion by the facts as they were then; but it does not follow that the evidence must be the same.]

The present case is one which the affidavits cannot be excluded,

(a) 1 Swans. 252.

(c) 8 Sim. 167. See *infra*, p. 605.

(e) 19 Ves. 350.

(h) 1 Russ. 361.

(b) 1 J. & W. 300.

(d) 4 Beav. 230.

(g) 7 Sim. 638.

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upon the principle laid down by Lord *Eldon* in *Smythe v. Smythe*, or *J. fferys v. Smith*, for in both cases the exclusion is put upon the ground that the particular facts which the affidavits were adduced to prove, being neither charged in the bill, nor supported, in the first instance, by affidavit, the Defendant has not been apprised of the points on which the Plaintiff rests his case, and has therefore had no opportunity of denying them by his answer. Here, however, the Plaintiff, so long ago as September, 1842, answered the Defendant's bill in the other cause, and by that answer insisted on the matters on which he now founds his case, and desires to prove: the Defendant, therefore, has had full opportunity of explaining or denying the facts in question by his answer.

VICE-CHANCELLOR:—

I will not finally dispose of this point without looking into the cases. The rules of admitting or excluding affidavits where they stand in conflict with the answer are several, depending on different principles. In the ordinary course of administering justice, the Plaintiff must wait until the hearing of the cause, for the decree which is to give him the rights for which his bill is brought. Occasions, however, happen, calling for the earlier interposition of the Court, and it is with regard to these special cases that the question arises. If the answer denies the *title* of the Plaintiff, the general rule is, that affidavits are not admissible to [*603] support the title which is so denied, or to contradict the answer in that respect (a). In other words, *title* is a question into which the Court will not enter before the hearing. The Court, in that case, tells the Plaintiff he is in the common situation of suitors,—he must wait for the trial of his claim until the hearing of the

(a) *Clapham v. White*, 8 Ves. 36; *Norway v. Rowe*, 19 Ves. 155, where the defendant admitted the deeds on which the plaintiff founded his title, but said that certain words had been introduced into them fraudulently: see *Id.*, pp. 146, 148. *Shirriff v. Barnard*, 8 Sim. 161, where the question was, whether the building, the removal of which was sought to be restrained, was affixed to the freehold,—the fact on which the title of the plaintiff, the landlord, depended: *Boddington v. Woodleg*, 8 Sim. 167. See *infra*, p. 605, *S. C.*

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cause,—and whatever danger there may be of intermediate waste, the Court does not look out for the answer. In the language of Lord *Edon*, “The application in the case of waste depends upon privity of title acknowledged by the answer” (a). And the relative times at which the affidavits and the answer are filed is wholly immaterial upon the question of title (b).

If an injunction has been obtained upon affidavits before answer, and the answer, afterwards coming in, does not dispute the plaintiff's title, the plaintiff may, as to acts of waste, or acts analogous to waste, read those affidavits against the answer. So far the rule is simple and plain, that the Court will try the questions [*604] raised between the answer and the affidavits filed before the answer (c).

I think it is also settled, that if you have obtained the injunction upon affidavit before answer, you may, when the answer comes in, file other affidavits in reply to the answer, in support of the case made by the first affidavits,—still excluding the question of title.

Another case is where affidavits are filed after the answer. According to *Smythe v. Smythe* such affidavits cannot be read for the purpose of obtaining an injunction, even as to acts of waste. Now, when the question is not on the title, but whether waste has been committed or not, the question of waste being a question which may be tried on affidavits against the answer, I should have thought the practice of the Court would have been not to decline trying a question only because the affidavits were filed after answer, but to have

(a) 19 Ves. 146.

(b) *Berkley v. Brymer*, 9 Ves. 355. The title of the plaintiff to relief depending on alleged fraud, which was denied: *Boddington v. Woodley*, *Shirreff v. Barnard*, ubi sup. If the answer is not positive, affidavits to verify documents (*Taggart v. Hewlett*, 1 Mer. 499; *Barrett v. Tickell*, Jac. 159) or facts (*Morgan v. Goode*, 8 Mer. 10) have been admitted. The common injunction, being only supported upon the equity confessed in the answer, (*Barrett v. Tickell*), is always treated in effect as involving the question of title, (i. e. his legal right to proceed at law).

(c) The rule appears to be the same where the plaintiff has filed affidavits, and would be in a condition to move upon them, if the state of the business of the Court permitted; (*Goodman v. Whitcomb*, 1 J. & W. 591; *Glassington v. Thwaites*, 1 S. & S. 134); or the proper time for making the motion had arrived; (*Atkinson v. Kemble* ubi sup.); or the motion had not stood over at the defendant's request. (*Morphett v. Jones*, ubi sup.)

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given time to answer the affidavit, treating the answer also as an affidavit (a). The case of *Smythe v. Smythe* is, however, a direct authority that this cannot be done, if the notice of motion is given after the answer: it is not in specie an authority in the case of a notice of motion given before the answer, but any distinction merely on that ground would introduce a refinement. Lord *Eldon*, "having expressly decided that the question of waste [*605] or no waste may be tried on affidavit against the answer, decides, in *Smythe v. Smythe*, that it cannot be so tried, unless affidavits of the particular acts complained of have been filed before the answer. The principle that you shall not file affidavits after the answer, because the defendant has not the opportunity of answering them, applies just as strongly to the case of a notice of motion given before as after the answer; and in *Lloyd v. Jenkins*, Lord *Langdale* seems to have been of opinion that the case of notice before the answer was within the same rule. I cannot do any thing which may appear to be opposed to those cases without more consideration. But in *Kershaw v. Mathews* (b), before Lord *Eldon*, where the answer came in after the notice, and before the affidavits, the argument was the same as that of the Plaintiff in this case; and Lord *Eldon*, without determining the point which was argued, held, for another reason, the answer to be an affidavit,—recognising, therefore, a distinction between the two cases.

The case of *Boddington v. Woodley* was this: after the answer came in to the original bill, the bill was amended, and the amendments were verified by affidavits. The *Vice Chancellor* rejected them, and, upon appeal to the *Lord-Chancellor*, I insisted, first, that the answer alone was sufficient to entitle the parties to what they wanted; and, secondly, that the admission of the affidavits could not depend on the time when they were filed. Lord *Cottenham* thought the answer was sufficient for the purposes of the motion,

(a) See *Charlton v. Poulter*, 1752, 19 Ves. 148, n. (70), ed. 2, where it would seem that, plaintiff's affidavits being used against the answer, the defendant also filed an affidavit in support of his answer. See also *Jervis v. White*, 6 Ves. 739.

(b) 1 Russ. 361. The answer of some of the defendants only regarded as an affidavit, if a material co-defendant has not answered: *Naglor v. Wellington*, 8 Sim. 396, S. P.

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and he made the order ; and he said it appeared to him
[*606] it could make no *difference when the affidavits were filed,
but he would not decide it, because the question did not
arise. He added, however, that he could not receive the affidavits,
because they went to the question of title.

VICE-CHANCELLOR :—

The practice of the Court has always appeared to me to be in an anomalous state on this point. There is in this case no question of title, for the partnership I understand to be admitted. With regard to acts of waste and analogous cases, as mismanagement and exclusion,—if affidavits are filed before the answer, the Court will not only read them against the answer, but also the affidavits filed after the answer, whether the injunction was obtained or not ; that is to say, the Court will try whether waste has been committed or threatened, on affidavits against the answer,—saying, in those cases, that the answer is to be considered as an affidavit. Why the Court should not, in all cases not involving the title, say the answer is to be considered as an affidavit, I do not know. But the more technical and arbitrary the rule is, the more binding it is upon me, because it cannot be controlled with reference to any principle. All the cases in the books decide that affidavits filed after an answer cannot be read against the answer, if affidavits have not been filed before, in support of a motion of which notice was given after the answer ; but there is no reported decision on a case precisely like the present, where the notice of motion was given before the answer, and no affidavits were filed. I remember the practice used to be, to give a notice of motion and file affidavits at the same time, that they might be on the file before the answer could come in. On the
[*607] technical *rule of the Court, I feel bound to hold that the affidavits are not admissible (a).

(a) See the cases collected, 1 Swans. 254, n.

 1843.—*Thorp v. Owen*.

THORP *v.* OWEN.

1843: 20th April, 2nd, 3rd, 6th, and 25th May, and 12th June.

The testator, by his will, desired that every thing, during the life of his wife, should remain as it was for her use and benefit; and after her decease he gave his real estate to his male heir, and his personal estate to his children; adding, that he gave the above devise to his wife, that she might support herself and her children according to her discretion, and for that purpose. *Held*, that the widow took an absolute interest for her life in the real and personal estate [1].

THE suit was brought to determine the construction of a will, which was in the following words:—"This is the last will and testament of me, *Henry Owen*, of &c. I desire every thing to remain in its present position during the lifetime of my wife, for her use and benefit; and after her decease I devise my real estate to my then male heir and his heirs in strict tail male, and I wish my personal estate to be then equally divided among all my children; and I appoint my friends *James Bridger*, and his brother *George Bridger*, both of &c., my executors, hereby revoking all former and other wills, and declaring this only to be my last will and testament, dated the 26th day of June, 1841. I give the above devise to my wife that she may support herself and her children according to her discretion, and for that purpose."

The testator died on the same day, leaving his widow and eleven children—five males and six females—surviving. The eldest son was at that time upwards of thirty, and the youngest child about ten years of age: several of the children were married in the lifetime of the testator.

The executors named in the will renounced probate, and letters of administration with the will annexed were granted to the widow.

*The bill was filed by the greater part of the children, [*608] and the husbands of the married daughters, against the widow, the heir-at-law, and the other children of the testator, and prayed the execution of the trusts of the will, and declaration of the rights of the parties. At the hearing of the cause, the common in-

[1] See *Sheppard v. Wilson*, 4 Hare, 395, note. *Longmore v. Elcum*, 2 Young & Coll. 363. *Campbell v. Campbell*, 7 Beavan, 482.

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quiries with respect to the family and the accounts of the estate were directed. The cause now came on for further directions.

Mr. *Roupell* and Mr. *Lindsell*, for the Plaintiffs, contended that, the widow was a trustee of the income of the real and personal estate during her life, for the benefit of herself and all her children either in equal shares or in such proportions as the Court might determine, having regard to their relative necessities, and that the widow had a discretion only in respect of the application of the shares of the children during their infancy.

Mr. *Walker*, Mr. *Koe*, and Mr. *Trotter*, for the Defendants having substantially the same interests as the Plaintiff.

Mr. *Tinney* and Mr. *Stinton* for the widow.—If it be admitted that the widow takes the property during her life charged with the maintenance of the children, that obligation must be confined within some definite limits; it must be confined to the maintenance of the children during their infancy, or, at the utmost, during the time they continue to form part of the household of their mother. The mode in which the children are entitled to participate in the estate must be such as to admit of the exercise of the mother's [*609] discretion in the application of it for their use. If the income should be divided amongst all the children, whether married and settled in life, or what is termed "foris familiarized," or not, it ceases to be a fund for the support of the widow and children, according to her discretion. The meaning as well as the intention of the bequest evidently is, that the mother shall take the income for the maintenance of her household, the testator relying upon her to afford, by that means, a home and support for her children forming part of that household.

Most of the cases cited are referred to in the judgment. The other cases were *Cooper v. Thornton* (a), *Robinson v. Tickell* (b), *Hanley v. Gilbert* (c), *Badham v. Mee* (d), *Berkeley v. Swinburne* (e), *Hadow v. Hadow* (g), *Wood v. Richardson* (h), *Pratt v. Church* (i).

(a) 3 Bro. C. C. 96.

(d) 1 Russ. & Myl. 621.

(h) 4 Beav. 174.

(b) 8 Ves. 142.

(e) 6 Sim. 612.

(i) Id. 177.

(c) Jac. 354.

(g) 2 Sim. 438.

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VICE-CHANCELLOR, after stating the will :—

Several of the children of the testator and of the Defendant, his wife, were minors at the time of his death ; all the minors have since been maintained by the widow, and the only question argued before me was, whether the adult children, male or female, either living at home or foris familiated, were entitled to participate in the income which was given to the wife for life.

Two points were conceded in the argument on the part of the widow : first, that, according to the true *construc- [*610] tion of the will, a trust is declared in favour of the children of the testator,—whether during infancy or not is another question, but that a trust is declared, excluding the widow from an absolute interest in the property for life : secondly, that, notwithstanding the indefinite character of the trust with respect to the amount to which the children are to participate in the life interest of the widow, the Court might execute such a trust in favour of adults as well as of infants. It was, however, argued, that the support of the children during their minorities, and nothing more, was contemplated by the will. Supposing a trust to be declared, the latter of the two concessions, was, I think, unavoidable upon the authorities. Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult as well as an infant takes under a trust for his support, maintenance, advancement, provision or other like indefinite expression, applicable to a fund larger, confessedly, than the party entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person. If that is to be altered, it should not be by any but the highest branch of the Court. I may mention on this point, *Broad v. Bevan*, (a), *Wetherell v. Wilson* (b), *Woods v. Woods* (c), *Pride v. Fooks* (d), *Jubber v. Jubber* (e), *Kilvington v. Gray* (g), and *Soames v. Martin* (h), *Gilbert v. Bennett* (i), to which may be added the case of *Alexander v. M' Cullock* (k).

(a) 1 Russ. 511, n.

(d) 2 Beav. 430.

(k) Id. 287.

(b) 2 Keen, 80.

(e) 9 Sim. 508.

(i) Id. 371.

(c) 1 Myl. & Cr. 401.

(g) 10 Sim. 293.

(h) 1 Cox, 391.

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[*611] *Now, with respect to the first concession,—that a trust was declared, and that the widow could not claim the absolute interest during her life, I was not satisfied at the time of the argument that the counsel for the widow had not paid a greater degree of deference to the language of some modern cases than the learned Judges by whom those cases were decided would claim in favour of their own decisions. The case is one of a class respecting which it is perhaps to be expected that an apparent discrepancy would exist in the decisions,—a discrepancy, however, which might be attributed not to any difference of opinion as to the principle which should govern the cases, but only on the manner of applying admitted principles. I doubt whether the concession ought to have been made.

The cases should be considered under two heads: first, those in which the Court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and, secondly, those cases in which the Court has read the will as declaring a trust upon the fund, or part of the fund, in the hands of the legatee. A legacy to A. the better to enable him to pay his debts expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A. could enforce in this court; and, again, a legacy to A. the better to enable him to maintain, or educate and provide for, his family must, in the abstract, be subject to a like construction: it is a legacy to the individual, with the motive only pointed out. This is very clearly, and in my opinion very correctly, laid down by the *Vice-Chancellor* in the late case of *Benson v. Whittam* (a); and the cases of

[*612] *Andrews v. Partington* (b), **Brown v. Casamajor* (c), and *Hammond v. Neame* (d), illustrate the same principle. At the same time, a legacy to a parent upon trust to be by him applied, or in trust, for the maintenance and education of his children, will certainly give the children a right in a court of equity to enforce their natural claims against the parent in respect of the fund on which the trust is declared. And a similar rule, as I have

(a) 5 Sim. 22.

(b) 2 Cox. 223.

(c) 4 Ves. 498.

(d) 1 Swans. 35.

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already observed, has prevailed in favour of adult cestui que trusts, notwithstanding the difficulty of measuring the amount of interest in those cases.

It is, I am aware, difficult to reconcile all the decisions on cases of this nature, but although those decisions may not appear reconcilable with each other, I am satisfied that the learned Judges by whom they have been pronounced did not mean to disregard the distinction I have noticed, or in any way to break in upon it. The difference has arisen in the different modes of applying admitted principles. In *Raikes v. Ward* (a), and *Crockett v. Crockett* (b), I thought, and still think, a trust was declared as well as a motive expressed; and I am satisfied that neither Lord *Cottenham* in *Woods v. Woods*, nor Lord *Langdale* in *Wetherell v. Wilson*, intended to negative the distinction to which I have adverted.

I do not at present give any opinion upon the question, whether the direction in this will is confined to minority or not. Mr. *Tinney* argued, with force which appeared to me almost irresistible, that the obvious intention was, that the widow should have the spending of her life income in one establishment. [*613] Supposing a child were willing to reside with the mother, and no reasonable objection could be urged against it, the testator having directed that every thing should remain as it was,—whether the Court would in that case allow the widow arbitrarily to refuse support to such child merely because he or she had attained the age of twenty-one, is one question; but it does appear to me to be another and a serious question, whether, if a son or daughter chooses to marry, and become foris familiated, leaving the house of the widow, and perhaps having a family, in that case, the intention of the testator, expressed in this will, requires that the widow should apportion a certain part of her income for the benefit of such son or daughter; whether, in such circumstances, she should no longer spend her income in one establishment, but divide it into as many different incomes as there are children, possibly not giving enough for their support to any, and not leaving enough for her own support. The question is, whether the testator did not mean to leave

(a) 1 Hare, 445.

(b) Id. 451.

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it entirely to the natural affection of the mother to provide for the children during her life, afterwards giving the property to them, as in fact he has done.

Having considered the authorities on the subject, it is impossible but that I should have formed an opinion on this case. It appears to me, that if I decide the case on the question of the adult or infant maintenance alone, it might be open to an appeal, the expense of which may perhaps be saved to the parties, by giving all the reasons that occur to me, as the grounds of my decision. If the counsel for the widow should think the authorities on the question, whether the gift creates an absolute interest or a trust, do not govern the present case, I should prefer to hear them, and also the counsel for the Plaintiffs, upon that point alone. My [*614] *object is, that my decision may be satisfactory to the parties, and that, so far as possible, they may be relieved from the necessity and expense of discussing this question elsewhere.

The case was again argued by Mr. *Roupell* and Mr. *Lindsell*, for the Plaintiffs, and Mr. *Tinney* and Mr. *Stinton*, for the widow. In addition to the cases cited on the former argument, and besides those mentioned in the judgment, they cited *Cary v. Cary* (a) *Pushman v. Filliter* (b), *Meredith v. Heneage* (c), *Blakeney v. Blakeney* (d), *Cape v. Cape* (e), *Stubbs v. Sargon* (f), *Ford v. Fowler* (g), *Knight v. Knight* (h).

VICE-CHANCELLOR :—

I am satisfied that, however long this case may be under consideration, there would be still some doubt upon it with reference to the authorities. I cannot, however, doubt the principle laid down by the *Vice-Chancellor* in *Benson v. Whittam* ; [1] it is plain to common sense that the law must be as it is there explained. If you give property to persons to accomplish an object, increasing

(a) 2 Sch. & Lef. 173.

(c) 1 Sim. 566, per Lord *Redesdale*.

(e) 2 Y. & Coll. 542.

(g) 3 Beav. 146.

(b) 3 Ves. 7.

(d) 6 Sim. 52.

(f) 3 Myl. & Cr. 508, 512.

(h) Id. 148.

[1] 5 Simons, R. 22.

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their funds so that they might be the better able to do it,—that is, in point of fact, a gift to them, and there is no trust which others can enforce. And I think those cases of *Bushnell v. Parsons* (a), *Hammond v. Neame*, *Burrell v. Burrell* (b), *Andrews v. Partington*, and others, are all cases in support of [*615] the same proposition, and recognising the principle with great clearness. A great number of these cases might be cited, but I will not go through them; the principle cannot be at all doubted, although Judges may differ as to the mode of applying it. I think it equally clear, if property be given to a parent upon trust to maintain herself and her children, that, although she takes a beneficial interest, and though to some extent there is an uncertainty as to the quantum she is bound to apply, it is impossible for me to hold that the cases do not decide that the Court will find the means of measuring the extent of the children's interest. The only question here is, under which of the two principles I am to say that this case falls; at the same time I agree with the argument, that if the expression, that the gift is to support the children, extends to the support of the children throughout the whole of their lives, in the various situations that may arise, the impossibility, I may almost say, of measuring the gift to each child by any rule to be laid down by a court of justice, is—in a case where there is no trust excluding the mother from taking whatever she is not obliged to part with—a strong argument against holding that the expressions which refer to the children were meant to create a trust binding on her. Lord Eldon's language, in the cases of *Morice v. The Bishop of Durham* (c), *Wright v. Atkyns* (d), and the other cases referred to, goes to shew that where words of trust are not used so imperatively as to exclude the legatee from taking any thing beneficially, there the difficulty of ascertaining how much that legatee was bound to give away is a strong argument against construing the gift to be a trust, then it appears to me, on the authorities, that [*616] the Court has held that the trust shall not in the case of children be void, but that it will find the means of ascertaining how

(a) Prec. Chan. 218, per Lord Keeper Wright.

(c) 10 Ves. 534.

(b) Amb. 660.

(d) T. & R. 157.

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much the parties to be benefitted are to take. It was on that ground I went in the cases of *Raikes v. Ward* and *Crockett v. Crockett*. In those cases the gift was made in terms which obliged the legatee to give something to the children. If it is not in such terms, of course there is no trust to exclude the legatee.

I considered this case very much in private, before I called for the second argument, and the conclusion to which I have come is, that the words of this will import a gift to the mother for life, and that afterwards the personal estate is to go to the testator's children and the real estate to his heir-at-law. The testator adds to the gift an explanation which appears to me merely to express what actuated his mind in the gift. He trusts to the affection of the mother towards her children, and says,—“I have given to her this large provision, in order that she may be able to support her children during her life.” The gift is to her, and the support is to be administered according to her discretion. I do not deny that the will may be construed another way, you may construe it thus,—“I give it to my wife for the purpose of being applied by her in the support and maintenance of the children;” but the words are equally consistent as importing, “I give it to her that she may be able to support her children.” I cannot see anything in the mere words used in that particular part of the will, which leads one way rather than the other; but I am satisfied, from the language of the whole will, that the gift is to her, to be applied according to her discretion. The

absence of any expression excluding the wife from taking, and the moral impossibility that any court of justice can measure the suggested bounty of the testator, in favour of all the children, in every possible state of circumstances, are grounds on which it appears to me I ought to decide that, in this case, the widow is not controlled by any equitable interest in the children.

I confess I have the less regret in coming to this conclusion, because, so far as respects the maintenance of the children during their minority, there appears to be no practical reason for deciding the case one way rather than another,—all such children having, in fact, been maintained, by the widow. With regard to the other children the difficulty of applying the fund in many cases which

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may arise, or be suggested, is such that I can hardly see any way of effecting it. The best legal conclusion I think is this: The testator has given the property to his wife absolutely, during her life, in order that the children may not suppose that they had been overlooked during that time, the testator tells them his reason for giving the property to the mother. I think, therefore, that the construction of the will is, that the widow takes the property absolutely for her life.

See *Longmore v. Elcum*, 2 Y. & Coll. Chan. Cas. 368.

*ELTOFT v. BROWN.

[*618]

1842: 26th July. 1843: 14th Feb, 19th April, and 22nd July.

Proceedings for taking the bill pro confesso, under the Order I. of the 11th of April, 1842, against a Defendant deemed to have absconded, for whom an appearance has been entered under the Order VIII. of the 16th of August, 1841, and who does not afterwards appear by his own solicitor.

BILL by parties beneficially interested in the real and personal estate of a testator, against *Brown*, the trustee and executor, and *Livesey*, to whom *Brown* had pledged the title-deeds of part of the trust estate. An injunction against *Brown* was obtained *ex parte*, and a receiver appointed after notice. *Brown* was served with the subpoena to appear and answer, on the 4th of April, 1842, and not having appeared, the Plaintiffs, on the 15th of April, obtained an order for liberty to enter an appearance for him, under Order VIII. of the 26th of August, 1841, and on the 16th of April, entered such appearance accordingly. A copy of the order for entering the appearance, and notice of its entry, was, on the 20th of April, left at *Brown's* last place of abode, and also served on his wife. *Livesey* deposited the title-deeds with the Master, and the bill was dismissed against him. *Brown* did not appear by his own clerk in Court, or solicitor (*a*), and the Plaintiffs caused it to be inserted in the *London Gazette* of the 14th of June, and once in every week,

(a) See Order XVI. of the 26th of October, 1842.

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for the four following weeks, a notice (a), according to [*619] the Order I. of the 11th of April, 1842, (under the third clause of that order (b)), that on the 14th of July the Court would be moved that the bill might be taken pro confesso against *Brown*. The motion was mentioned on the 14th of July, but that not being a seal day, it was deferred, by the direction of the Court, until the following seal day, which was the 16th of July.

Mr. Elmsley moved, pursuant to the notice in the *London Gazette*, that the Plaintiffs' bill might be taken pro confesso, immediately, against the Defendant *Brown*.

The motion was supported by affidavits stating the reasons of the deponents for believing, and their belief that *Brown* had sailed for *Philadelphia* in the preceding month of April, and had ever since resided there; that he was in insolvent circumstances at the time of his departure, and that a fiat in bankruptcy had been issued against him, but had not been prosecuted, as there did not appear to be any estate of the bankrupt (c). The wife of *Brown* appeared by the affidavits to be within the jurisdiction.

THE VICE-CHANCELLOR ordered that the cause should stand for hearing in the paper of causes on the 22d day of July, and that the Plaintiffs' clerk in Court should then attend with the record of the

(a) "Between *Eltoft* and others, Plaintiffs, and *T. Brown* and *T. Livesey*, Defendants. Take notice, that pursuant to an order of &c. made in this cause, bearing date the 15th day of April last, an appearance was on the 16th day of April last entered for the above-named Defendant *T. Brown*, under the Order VIII. of the 26th day of August, 1841, and he the said Defendant *T. Brown* not having appeared by his own clerk in Court, the above-named Plaintiffs hereby give notice, pursuant to the order of this Court of the 11th day of April, 1842, that this Court will be moved by &c. for the Plaintiffs before &c. on Thursday, the 11th day of July, 1842, or so soon after as counsel can be heard, that the Plaintiffs' bill in this cause may be taken pro confesso immediately against the said Defendant *T. Brown*. Dated this 14th day of June, 1842. *J., B., & E.*, the Plaintiffs' solicitors.

(b) *Beav. Ord. Can.*, 196.

(c) See ante, p. 534, n.

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bill, in order to have the same taken pro confesso. His Honor also directed *that this order should in the mean [*620] time be served on the wife of *Brown* (a).

This cause coming on this day, &c. [reciting the entering of the appearance.] And whereas the Plaintiffs being unable, with due diligence, to procure attachment to be executed against the said Defendant, by reason of his being out of the jurisdiction of the Court, the said Defendant having absconded to avoid the process of this Court, and not having entered an appearance by his own clerk in Court, they, the said Plaintiffs have caused to be inserted in the *London Gazette*, five several notices, that this Court would on the day therein named be moved to take the Plaintiff's bill pro confesso against the said Defendant, and the said Defendant's answer not having been filed, as by the six clerks' certificate appeared, it was, &c. [reciting the Order of the 16th of July]. And the Plaintiff's clerk in Court this day attending, &c., upon debate of the matter, and hearing the Order of the 16th day of July instant, and the record of the Plaintiff's bill read and what was alleged by the counsel for the Plaintiffs, this Court doth order and decree that the Plaintiff's bill be taken pro confesso against the said Defendant *T. Brown*. And it is ordered that it be referred to the Master &c. Usual accounts of the testator's estate. Inquiries as to children, and next of kin. New trustees to be appointed. Receiver continued. Further directions, and costs reserved.

The Master, by his report, found that the Defendant *Brown* had absconded to avoid the process of the Court, and was then resident out of the jurisdiction; and that in his absence it was impossible to take the accounts directed, or to examine him on interrogatories: he found that *Brown* had had no beneficial interest under the will, but was a trustee only for the parties beneficially interested. He made his report as to debts, legacies, and the other matters referred, and certified that he had appointed certain persons new trustees.

*Mr. *Elmaley* moved that the report might be confirmed [*621] ed absolutely, or that the cause might be set down for further directions, without confirmation of the report. The proceeding before the Master was of necessity *ex parte*: the Defendant was

(a) See ante, p. 535.

 1843.—*Eltoft v. Brown*.

found by the report to have absconded ; and there was no person on whom the orders *nisi* or absolute, for confirming the report, could be served. If the case were to be treated as one in which the decree was pro confesso for want of answer only, it would be impossible to make the proceedings effectual: *King v. Bryant* (a), *Parry v. Perryman* (b), *Thompson v. Trotter* (c), *Dominicetti v. Latti* (d), 1 Dan. Chan. Pr. 698, and 2 Dan. Chan. Pr. 804, 805, were mentioned.

 1843 : 14th February.

Where a Defendant, after being served with the subpoena to appear and answer the bill, does not enter an appearance by his own solicitor, but absconds to avoid the process of the Court, the Plaintiff may, on the bill taken pro confesso, under the Order I. of the 11th of April, 1842, proceed *ex parte* as against a Defendant who has not appeared, although the Plaintiff has entered an appearance for him, under the Order VIII. of the 26th of August, 1841.

THE VICE-CHANCELLOR said that the entering of the appearance for the Defendant, under the Order VIII. of August, 1841, was for the purpose of giving the Plaintiff the benefit of that step in the cause, and enabling him to count the subsequent process from that date, but it had not the effect of placing the Defendant in the same situation as if he had regularly appeared in the cause. The Court being satisfied that the Defendant had absconded, the case was the same as if he had not appeared. The report might be confirmed *ex parte*, and the cause set down for further directions.

Before any further proceedings were had, one of the Plaintiffs married, and the suit abated. A bill of revivor was filed, and

[*622] ‘Mr. *Elmsley* moved that the bill of revivor might be taken pro confesso against *Brown*, or that the Plaintiffs might be at liberty to enter an appearance for him, on which the subsequent proceedings might be founded. No answer was required to the bill of revivor.

(a) 3 Myl. & Cr. 191.

(b) M. R. 13 July, 1833, cited 2 Dan. Ch. Pr. 805, n. (r).

(c) 10 December, 1823, cited 3 Myl. & Cr. 198.

(d) 2 Dick. 583.

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1843 : Bill of revivor.

The fact that an appearance has been entered by the Plaintiff for the Defendant, to an original bill, under the 8th Order of August, 1841,—or that an original bill has been taken *pro confesso* against a Defendant under the 1st Order of April, 1842, is no ground for taking either of those steps on a mere bill of revivor in the same suit, against such Defendant, without previously going through all the preliminary steps, as in the case of an original bill.

THE VICE-CHANCELLOR said that the Court had no power either to order the bill of revivor to be taken *pro confesso*, without the previous process, or to give liberty to enter an appearance to a bill, no subpoena thereon having been served. The Plaintiffs might proceed as on an original suit, and then the question would be, whether the Defendant could be treated as absconding to avoid service of process in this suit, as well as in the first.

The Plaintiffs moved, under the act 1 Will. 4, c. 36, s. 3 (a), that the Defendant might be ordered to appear to the bill of revivor on a certain day to be appointed by the Court. The motion was supported by affidavits, shewing, that the Defendant had continued to be, and was still, out of the jurisdiction, and by the certificate of the clerk of records and writs, that the bill was filed on the 13th of March, and that no appearance had been entered thereto for the Defendant. The Defendant was then ordered to appear within a month, and the order was published, and the bill of revivor afterwards taken *pro confesso*, according to the old practice (b).

*The original cause coming on for further directions, [*623] and on the hearing of the bill of revivor, and of a supplemental bill, against the new trustees and some other parties, the Court continued the injunction against *Brown* until further order, directed the receiver to pass his final accounts, and ordered the costs of the Plaintiffs in all the causes, and the costs of the Defendants in the supplemental cause, to be taxed and paid out of the balance to be paid by the receiver, and by the trustees on the future rents and profits, with liberty to any of the parties to apply.

(a) Amended, as to the manner of publication at the parish church, by the act 7 Will. 4, & 1 Vict. c. 45, s. 2.

(b) See *Baker v. Keen*, 4 Sim. 498.

 1843.—*Weatherby v. St. Giorgio.*

HELE v. OGLE.

1844: 11th January.

Defendant residing out of the jurisdiction, deemed to have absconded to avoid the process of the Court, under the 1st Order of the 11th of April, 1842.

THE Defendant was out of the jurisdiction when the bill was filed, and had not since come within the jurisdiction, but being served abroad under the act 4 & 5 Will. 4, c. 82, he appeared by his own solicitors, who intimated an intention to defend the suit. His solicitors afterwards informed the solicitors for the Plaintiff that they had consulted counsel, who had advised that the Defendant should submit to the Plaintiff's demand, and not defend the suit. No answer was put in.

Mr. *Walpole* moved, on notice served upon the solicitors of the Defendant, more than fourteen days previously, that the bill might be taken pro confesso, under the Order I. of the 11th of April, 1842.

THE VICE-CHANCELLOR held, that the Defendant should be deemed to have absconded to avoid the process of the Court and made the common order, directing the cause to be in the paper [*624] of causes on a certain day, "in order that the bill might be taken pro confesso, unless an answer should be put in by the Defendant in the mean time: this order to be served forthwith on the solicitors of the Defendant.

WEATHERBY v. ST. GIORGIO.

1843: 8th, 11th, and 29th May.

A testator directed his debts to be paid, and appointed executors in *England*, and other executors in *Italy*, directing the English executors to transmit the residue to the Italian executors, and bequeathing such residue amongst classes of persons alleged to reside in *Italy*:—*Held*, that the sum to be paid over, being the residue

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after payment of debts, the Italian executors must be regarded as simply trustees of that fund, and not as executors holding it charged with debts; and that therefore inquiries must be directed to ascertain the persons beneficially entitled to the fund, under the bequest.

That where a trust fund is to be administered under the direction of the Court, the general rule requiring the cestui que trusts to be parties, is applicable to foreign trustees and cestui que trusts, residing out of the jurisdiction, unless a special case of difficulty or inconvenience in the application of the rule be shewn.

JOHN ST. GIORGIO, a native of Italy, by his will dated in March, 1833, after directing all his debts and funeral and testamentary expenses to be paid as soon as conveniently might be, appointed *Weatherby*, the Plaintiff, and *W. S. Lewis*, executors of his will, so far as related to his property in *England* and *Ireland*, and elsewhere, (except in *Italy*), and Doctor *Francesco Ciceri* and Signior Advvocato *Giuseppe Montanara*, of *Milan*, executors of his will, so far as related to his property in *Italy* and not elsewhere, and after giving certain legacies, the testator gave and bequeathed unto *Lewis* and the plaintiff the residue of his estate and effects in *England* and *Ireland*, or elsewhere, (except in *Italy* as aforesaid), upon trust, as to certain parts thereof, for his son *John Nathaniel St. Giorgio*, and the children of his said son as therein mentioned. And (after payment of the legacies bequeathed by any codicil he might make) the testator directed his said executors in *England* to transmit the residue, and every part thereof, to his said executors in *Italy*, to be by them jointly disposed of, together with all property and effects that he should possess in *Italy*, or be entitled to at the time of his decease, amongst all and every his "nephews [*625] and nieces, the children of his late sisters *Annunziata De Micheli* and *Teresa Corbetta*, who should be living at his decease, or the husbands or wife of such of them respectively as should be then dead, without leaving issue then living or born in due time afterwards, to be equally divided between them in equal proportions as tenants in common, and if but one such child, husband, or wife, to pay the whole to such only child, husband, or wife, subject to the proviso, that if there should at his decease be living any child or children of his said nephews or nieces who should have died in his lifetime, then, that the share of such deceased parent in such residue should be paid to his or her child or children in equal portions.

1843.—*Weatherby v. St. Georgio.*

The testator made a codicil to his will, of the same date, by which he gave certain legacies. He made a second codicil, dated the 16th of March, 1833, whereby he bequeathed certain debts and securities to his said son, in trust for his grandchildren. Subsequently, in the same year, the testator left *England*, where he had resided, and returned to *Monza*, in *Lombardy*. He there made several other codicils to his will, in the Italian language, bequeathing various legacies. The translation of one of these, dated the 5th of February, 1835, was as follows :—

“ When my testament in *London*, and also in succession my codicil at *Milan*, shall be completely fulfilled, I will, that all the surplus residue be given to the descendants of my sisters per stirpes, and not per capita. My executors shall be the advocate, *Guiseppè Montanara*, whom I join with Doctor *F. Ciceri*, of *Milan*.” By a later codicil, dated in March, 1838, the testator gave a legacy to a charitable institution in *Monza*.

The testator died at *Monza*, in August, 1840, leaving [*626] **W. S. Lewis*, the Plaintiff *Weatherby*, and the Defendant *Guiseppè Montanara*, surviving. *Ciceri* died in the lifetime of the testator. *Montanara* duly published and proved the will and codicils, and filed the same of record in the imperial royal municipal court of *Monza*, and sent official copies to the Plaintiff, who proved translations thereof in the ecclesiastical courts in *England* and *Ireland*. *Lewis* renounced probate.

The Plaintiff filed the bill against the son and grandchildren of the testator, and *Guiseppè Montanara*, praying that the estate might be administered, and the trusts of the will and codicils performed under the direction of the Court. *Montanara*, though out of the jurisdiction, appeared, and put in his answer. The cause was heard on the 24th of June, 1842, and by the decree then made it was referred to the master, to inquire whether *Montanara* was the duly constituted executor or representative of the testator, so far as related to his property in *Italy*, according to the laws in force there ; inquiries were also directed in the ordinary form with regard to the children of the testator's sisters, and whether they or their representatives were out of the jurisdiction, and if so,—the Plain-

1843.—*Weatherby v. Georgia.*

tiff submitting to account, the usual accounts were directed. The inquiries were prosecuted before the Master only on the first point, on which the draft-report was prepared, finding that *Montanara* was the duly constituted executor or personal representative, as to the property in *Italy*. In order to avoid the expense of making in this country the inquiries as to the families of the Italian legatees, *Montanara*, before taking the report, presented his petition of rehearing, thereby suggesting, that, as such executor and legal personal representative in *Italy*, he was, under and according to the terms and fair construction of the will and codicils, entitled to 'receive and apply in *Italy*, according to such will ['627] and codicils, the testator's estate thereby given and directed to be paid to him for the purposes therein mentioned.

Mr. *Roupell* and Mr. *G. L. Russell*, for the Plaintiff, submitted that the decree was right, but that an inquiry as to the domicile of the testator might be properly added.

Mr. *Koe* for the son and grandchildren of the testator.

Mr. *Tinney* and Mr. *Rogers* for the Defendant *Montanara*.

The testator has appointed a person to administer his estate in *Italy*, and he has directed the surplus in this country to be transmitted to that person. What prevents this from being done? An artificial rule of this Court, by which it assumes the power of executing all trusts brought within its direction. But is not this rule confined to cases in which it can adequately and conveniently perform the office of trustee,—namely, to cases where the objects of the trusts are subjects of this kingdom, and within the operation of its laws? The principle upon which the Court acts in assuming the administration of trusts, is founded on justice and convenience; but the difficulty and expense of undertaking a trust, where all the facts upon which the Court is to proceed, and the law by which it is to be guided, must be collected by inquiries in a foreign country, take the case altogether out of the operation of that principle. If the objects of the testator's bounty were simply indicated, and no hand interposed 'as the medium of distribution, the Court might have ['628] no alternative but that of administering the estate amongst

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such objects; but where that course is not absolutely necessary,—and where, as in this case, there is a foreign executor, the Court will not undertake that office. The distinction between the cases of English and foreign trusts is seen in the cases of legacies to foreign charities, which the Court does not undertake to administer, but merely ascertains the hand to receive the legacy.

The following cases were cited: *Attorney-General v. Lepine* (a), *Provost &c. of Edinburgh v. Aubery* (b), *Preston v. Lord Melville* (c), *Attorney-General v. Stephens* (d), *Mayor of Lyons v. East India Company* (e), *Emery v. Hill* (g), *Hall v. Dewes* (h), *Sandilands v. Innes* (i), and *Thorp v. Owen* (k), and analogous cases.

VICE-CHANCELLOR:—

The testator first directs all his debts to be paid, and then that his executors in *England* shall transmit the residue to his executors in *Italy*, to be by them disposed of, together with all his property in *Italy*, among certain legatees. It is clear, therefore, that the fund which he had in his contemplation was the residue after the debts were paid, and it appears to me impossible to escape the conclusion that the executors in *Italy* must be taken to be legatees [*629] in trust. I am now called upon to decide a perfectly abstract proposition. The rule in *England* is, that if property is given to a trustee for certain cestui que trusts, the Court will pay it to the cestui que trusts, and not to the trustee. If I were not to follow that rule in this case, I should, in effect, decide, that in every case where there is a direction to pay money to a foreign trustee, to be by him paid to another person, that such other person is not a necessary party to the suit; or, in other words, that the rule, which is applicable in *England*, ceases to apply where the trustee and objects of the trust are the subjects of a foreign country, and out of the jurisdiction of the Court. There is nothing

(a) 2 Swans. 181.

(d) 3 Myl. & K. 347.

(g) 1 Russ. 112.

(k) Ante, p. 607.

(b) Ambl. 236.

(e) 1 Moore, Privy Council Cases, 175.

(h) Jac. 183.

(c) 8 Cl. & Fin. 1.

(i) 3 Sim. 263.

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at present before me to shew that there is any difficulty in this case to justify a departure from the ordinary rule: At the present time, the case must be open to the same observations as all other cases are with respect to parties,—that wherever a great practical inconvenience arises in applying the general rule, there the Court has power to relax it, in order to prevent that which was laid down for the purposes of justice from working the contrary; And that would no doubt be the case, if, where a small property had to be divided among a great number of foreigners, all the cestui que trusts were compelled to prove their right in the Master's office in *England*. I must continue the direction for inquiry with respect to the parties abroad. I cannot introduce a rule different from that which prevails in all ordinary cases, without seeing that there is in truth some particular difficulty in following it.

I endeavoured at first to adopt the argument that *Montanara* and *Ciceri* should be considered as strictly executors; for I then should have had less difficulty in directing the money to be paid over to them, as they would in that case have been bound to pay any debts which might have existed, and would have [*630] been accountable for the residue: but it is admitted that the debts must be paid in this country, and the executors here are directed to pay over the surplus to the executors in *Italy*. It is therefore a payment by a trustee to a trustee.

I mean to decide nothing beyond what I am forced to decide. I only abstain from deciding, that where the legatees are foreigners, the rule requiring the cestui que trusts, to whom personally the money is to be paid, to be made parties, does not prima facie apply. The case is different from that of a charity where there is no direction to pay personally.

It appears to me that much difficulty might be avoided by *Montanara* having the carriage of so much of the order as directs the inquiries, for he will probably be in a condition to shew to the Master better than any other party the state of the families, and what difficulties there are in following out the order.

[The inquiries proper to be made were afterwards considered in detail.]

 1843.—*Weatherby v. St. Giorgio.*

THIS Court doth order : [Directions as to payment of fund into Court, &c. to stand.] And it is ordered that it be referred to the Master, &c. to inquire and state to the Court what was the testator's domicile at the time of his death. And, &c. inquire, &c. whether the Defendant *Giuseppe Montanara* is the duly constituted executor or personal representative of the testator, according to the law of the country of the testator's domicile at the time of his death. And, &c. inquire, &c. whether, by the law of the country of the testator's domicile at the time of his death, the bequest in the will contained, whereby the testator directed his executors in *England* to transmit the residue of his property not therein bequeathed to his executors in *Italy*, to be by them jointly disposed of, together with all property and effects

[*631] *that he should possess in *Italy*, in manner therein mentioned. was wholly, or to any and what extent, valid. And, &c. inquire, &c. whether by the law of the country of the said testator's domicile at the time of his death the right or title to receive the said residuary property survives to the said *Giuseppe Montanara* alone, *Francesco Ciceri* in the said will also named an executor thereof being now dead. And, &c. inquire, &c. whether the said testator's sisters, *Annunziata de Micheli* and *Teresa Corbetta*, in the said will named, or either and which of them, had any, and if any, what children or child, and whether any or either, and which of such child or children have died, and if so, when and at what ages they respectively died, and who, according to the law of the domicile of such child or children respectively who survived the said testator and have since died, are entitled to receive the shares of such child or children, if any ; and whether any or either and which of such children, if any, who died in the lifetime of the said testator left any and what issue then living, or born in due time after their parents' decease ; and whether any or either and which of such issue, if any, are or is dead, and who, according to the law of the domicile of such issue respectively, are entitled to receive their shares, if any, of the said testator's residuary property ; and whether any or either and which of such child or children who, if any died without leaving any issue living at the time of the testator's death, or born in due time afterwards, left any and what husband or wife, as the case may be, and whether such husbands or wives respectively are living or dead, and who, according to the law of the domicile of such of the said husbands and wives respectively, if any, as are dead, are entitled to receive their shares, if any, of the said testator's residuary property ; and it being alleged that all the children of the said testator's said two sisters who were living at his death, and the husbands or wives as the case may be, of such, if any of them, as were then dead without leaving issue then living, or born in due time after, and the issue of such, if any, as were then dead leaving issue, or the persons or person so entitled respectively as aforesaid are abroad, out of the jurisdiction of this Court, it is ordered that it be referred, &c. to inquire, &c. whether such is the fact. And the said Defendant *Giuseppe Montanara*, is to have the carriage of this decree, so far as relates to the inquiries relating to the testator's domicile, and to the rights of the said Defendant *Giuseppe Montanara*, and to the children and issue of the said testator's said sisters, their domicile and residences, and the person entitled under them, and their domicile and residences, respectively ; and the rights of and under all the above parties' domiciles and residences abroad, according to the law of the domicile of such parties severally and respectively ; and in case the Master shall find that the said Defendant *Giuseppe Montanara* is the

 1843.—*Bertolacci v. Johnstone*.

duly constituted executor or personal representative of the said testator, *according to the law of the country of the said testator's domicile at the [*632] time of his death, and that all the children of the said testator's sisters who were living at his death, and the husbands and wives, as the case may be, of such, if any, of them, as were then living, or born in due time afterwards, and the issue of such, if any, as were then dead leaving issue, or their legal personal representatives are abroad, out of the jurisdiction of this Court, then,—the Plaintiff submitting to account,—it is ordered that the said Master do take an account of the personal estate and effects of the said testator, not specifically bequeathed, come to the hands of the Plaintiff, or, &c. And it is ordered, &c. [Usual directions for an account of debts, funeral expenses, and legacies, and application of the personal estate in a due course of administration. Inquiries relating to particular persons indicated by the will, and concerning certain specific property. Liberty to state special circumstances. Further directions, and costs reserved.]

 BERTOLACCI v. JOHNSTONE.

25th Nov. and 5th Dec.

A Plaintiff amending his bill after answer, by adding new Defendants, does not thereby acquire a right to make a further amendment against the original Defendants, under the 13th Order of April, 1828, within six weeks after the answers of the new Defendants are to be deemed sufficient; but the time during which the Plaintiff may amend, under that order, must be counted from the date when the last answer of the original Defendants is to be deemed sufficient.

An application for leave to amend after answer, not founded upon the 13th Order of April, 1828, must be supported by affidavits, not confined to the facts required to be shewn in cases within that order, but sufficient also to satisfy the Court that from the occasion and necessity for the proposed amendments, the leave ought to be given.

THE original bill was filed on the 6th of December, 1842, against Sir *A. Johnstone*, as the sole Defendant. The appearance was entered on the 7th of December, and the answer put in on the 3rd of February, 1843. The Plaintiff obtained an order to amend on the 6th of May, and the amended bill was filed against the Defendant *Johnstone*, and other Defendants then added, on the 26th of May. The answer of the Defendant *Johnstone* to the amended bill was put in on the 1st of July, 1843. In Michaelmas Term, the Plaintiff applied to the Master for leave to amend the bill, supporting his application by the affidavit required by the Order XIII.

 1843.—*Bertolacci v. Johnstone*.

(amended) of April, 1820. The application was opposed, and the Master refused to make the order, being of opinion that the six weeks within which, according to the Order XIII., it must be obtained, had then expired. The Plaintiff now moved the Court for leave to amend the bill, supporting the motion by the affidavit which was tendered before the Master. The Defendants (other than Sir A. Johnstone) had not answered.

Mr. Burge and Mr. W. R. Ellis, for the motion, cited *Evans v. Hughes* (a), *Cullingworth v. Grundy*, (b), and argued, that, as some of the Defendants had not answered, the time allowed for amendment by the 13th Order had not expired.

Mr. Roupell and Mr. James Parker, for the Defendant *Johnstone*, opposed the motion, and insisted that the construction suggested by the Plaintiff led to the absurd consequence of enabling him to preserve his power of amending the bill so long as he might think proper to add new parties. The motion could not be sustained as an appeal from the Master, for the Master plainly had no power to make the order: *Haddelsea v. Nevile* (c), *Lloyd v. Wait*, (d), *Attorney General v. Nethercoat* (e), *Machitt v. Palmer* (g). And it could not be sustained as an original motion, for the Plaintiff had not supported it by the necessary evidence: *Haddelsea v. Neville*, *Phillips v. Godding* (h).

VICE CHANCELLOR :—

In this case an application by the Plaintiff for leave to amend his bill was made during the present term to the Master. The application was made under the 13th Order of 1828, and supported by the affidavit required by that order. The application was opposed before the Master by the Defendant Sir Alexander Johnstone, upon a suggestion that the six weeks within which a plaintiff by the terms of the 13th Order is required to

(a) 5 Sim. 666.

(b) 2 Myl. & K. 359.

(c) 4 Beav. 28.

(d) 4 Myl. & Cr. 257.

(e) 2 Myl. & Cr. 604.

(g) 10 Sim. 241.

(h) 1 Hare. 40.

1843.—*Bertolacci v. Johnstone*.

make his application had expired; and the Master being of opinion that the six weeks had expired, refused the application. And if the six weeks had expired, there can be no doubt that the Master's jurisdiction was gone, the decisions being express and clear that the Masters have no power to dispense with the general orders of the Court: *Loyd v. Wait* (a) *Smith v. Webster* (b).

The application was then made before this Court, and was rested by the Plaintiff upon the 13th Order of 1828, and the affidavit which that order requires, and upon no other ground. [His Honor stated the dates of the several proceedings as above.]—Now, if Sir A. Johnstone had continued to be sole Defendant, I do not see how any question could have arisen. The plaintiff had an order to amend against Sir A. Johnstone after answer, and the 18th Order says the Plaintiff shall have no further order to amend, unless the same be obtained within six weeks after the answer of a sole Defendant is to be deemed sufficient. It is admitted, that at the time of the application to the Master, the six weeks had long since expired, supposing him to have continued the sole Defendant. The Plaintiff, therefore, was forced, in support of his case, to contend, that the addition of new parties to the bill by the first amendment took the case out of the operation of the 13th Order against the original Defendant; and that because the Plaintiff has had "no [*635] order to amend against the new Defendants, the right to amend against them draws with it a right to amend against the original Defendant. That argument, if well founded, might perhaps, supersede the necessity of the affidavit required by the 13th Order; for, as against the new Defendants, the Plaintiff would have a right to amend his bill once, as of course, without any affidavit. This, however, was not contended for; the Plaintiff admitted that, as against the original Defendant, the affidavit was necessary. If this was so, the Defendant said that it followed, the six weeks to which the right to amend is restrained by the 13th Order must apply also; and this again was admitted by the Plaintiff; but it was insisted, that upon a sound construction of the 13th Order, the con-

(a) 4 Myl. & Cr. 257.

(b) 8 Myl. & Cr. 244. See *Strickland v. Strickland*, 4 Beav. 146.

1848.—*Bertolacci v. Johnstone.*

sequence of adding parties to the bill was to give a new point of time from which six weeks was to be computed. I am clear that that is not a sound construction of the order. If such a construction were admitted, the 14th Order would be virtually abrogated, and the old practice, which it was the object of that order to supersede, would be revived; for a plaintiff, in the first instance, or by the colourable addition of a friendly party, might acquire the right of amending his bill toties quoties against an original Defendant. In order that the 13th Order may be effectual, it must be applied separately against each Defendant. Each must have the right to claim the benefit of the order: and if a Plaintiff chooses, without reasonable cause, to amend his bill against any one Defendant before making all necessary parties to his bill, and getting in their answers, he cannot by so conducting his suit acquire a right as of course to deprive the original Defendant of the protection of the 13th Order.

I have made the above observation in deference to [*636] *the very earnest argument which was addressed to me by the Plaintiff's counsel. But I consider the point as settled by authority: *Attorney-General v. Nethercoat* (a), *Haddlessea v. Nevile* (b), *Machitt v. Palmer* (c); and so far as the jurisdiction of the Master is concerned, the case of *Evans v. Hughes* (d). Those cases necessarily decide that the Master had in this case no jurisdiction; for if he had, the jurisdiction of the court, except on appeal, is taken away by the act 3 & 4 Will. 4, c. 94, ss. 13. 14. So far, therefore, as the question depends upon the jurisdiction of the Master, I am clear the Master was right. No injustice can follow from such a decision: for although the Master cannot, the Court may dispense with its general orders in a proper case.

The only way in which the Plaintiff's application could be sustained was, that to which I pointed the attention of his counsel, but which I understand them to repudiate, namely, to consider the application before me as the original application for leave to amend, and by contending that the affidavit required by the 13th Order ought to satisfy the Court. In the *Attorney-General v. Nethercoat*,

(a) 2 Myl. & Cr. 604.
(c) 10 Sm. 241.

(b) 4 Beav. 28.
(d) 5 Sm. 666.

1843.—*Bertolacci v. Johnstone*.

Lord *Cottenham* decided that the affidavits required by the 13th Order was indispensable ; but he did not decide, that, in a case not falling wholly within that order, such affidavit alone would necessarily be sufficient. In *Matchitt v. Palmer* the *Vice-Chancellor of England* gave leave to amend upon that affidavit only, but no objection was taken to the sufficiency of the affidavit, the only point argued before him being that of jurisdiction. In *Haddelsea v. Nevile*, the ground of the application supported by affidavit was matter newly discovered since the last amendment. The report *states that the Master of the Rolls was not satisfied with [*637] the affidavits, but the particulars in which they were defective are not given. My own opinion, explained by the reasons I have already mentioned, is, that in order to preserve the 13th Order for any useful purpose, the affidavit required by the 13th Order, however necessary, ought not alone to satisfy the Court in a case not falling wholly within the 13th Order. I do not mean to say that the Court ought to lay down any very strict rule for cases like the present ; but I think the Court ought to be informed of enough of the case to explain at least why the new Defendants were not originally made parties, and why the Plaintiff is placed in his present difficulty ; and shewing that no material inconvenience will arise to the original Defendant, in order that the Court may be satisfied the rules of practice have not been abused.

It was said that no answer to the amendments would be required from Sir *A. Johnstone* : but that, in the abstract, can make no difference, for the amendments may be such that he may be advised he ought to answer them.

As the present application has been made by way of appeal from the Master's judgment, and not otherwise, and has been rested exclusively upon the 13th Order and no special case for making any order to amend has been stated, I think I ought in this case to make an order, the same in substance as was made by Lord *Cottenham* in the *Attorney-General v. Nethercoat*.

[Motion refused with costs, but without prejudice to any subsequent application for leave to amend.]

 1843.—Breeze v. English.

[*638]

*BREEZE v. ENGLISH.

1843: 12th and 14th June.

The right of a plaintiff to call for an answer to his amended bill, does not depend on the fact of whether the order for leave to amend is made upon the undertaking to pay costs to the Defendant, or to amend the Defendant's office copy; and, therefore, where the bill was amended under an order whereby the Plaintiff undertook to amend the Defendant's office copy, a motion to set aside a subpoena requiring the Defendant to appear to and answer the amended bill was refused.

ON a special application to the Master, the Plaintiff obtained an order that he should be at liberty to amend his bill as he might be advised, undertaking to amend within three weeks, and amending the Defendant's office copy. The Plaintiff thereupon amended his bill, and served the Defendant with a subpoena to appear to, and to answer the amended bill.

Mr. *Kenyon Parker* and Mr. *James Hill* moved that the subpoena might be set aside for irregularity, on the ground that the Plaintiff, requiring a further answer, ought to have taken out the order to amend, upon payment of 20*s.* costs, and not merely upon amending the Defendant's office copy. They said that the Plaintiff had the option of amending the office copy, instead of paying the 20*s.* only, where no further answer was required. *Boddington v. Woodley (a)*. Not having paid such costs, he was entitled to call for an answer.

Mr. *Cooper*, for the Plaintiff, submitted that the circumstance of whether a further answer was required or not, was immaterial to the question. *Cox v. Champneys (b)*; *Boswell v. Tucker (c)*.

THE VICE-CHANCELLOR adverted to the Statute 3 & 4 W. 4, c. 94 (d), under which applications for leave to amend are made to the Masters in the first instance, and observed that by the 15th section, the Master was empowered

(a) 9 Sim. 330.
(c) 2 Keen, 188.

(b) 6 Madd. 314.
(d) 8s. 13, 14, 15.

1843.—Goldsworthy v. Crossley.

either to direct that the costs of such applications to him should be costs in the cause, or to award what costs the parties should pay. In this case the Master had not given any direction by his order with respect to costs, but the existence of any such direction, or the absence of it, could not affect the question, whether the amendments were to be answered. The right to a further answer could not depend on the form of the order as to costs, or on the question, whether the Defendant was to be paid 20s. in respect of costs, or to have his office copy of the bill amended, free of expense. Even if the Defendant had, before answering, been entitled to costs, the reasonable course would have been, instead of this motion, to have applied to the Court to stay the process under the subpoena, until the Plaintiff had fulfilled the condition by making the required payment.

[Motion refused, but without costs, the practice on the subject having been unsettled.]

GOLDSWORTHY v. CROSSLEY.

1843 : 5th and 6th December.

The 19th Order of April, 1828, although it excludes the Michaelmas and Christmas vacations from being reckoned in the time allowed for amending bills; has not in a case where the answer must be deemed sufficient before the vacation, and the Plaintiff has obtained no order to amend, the effect of excluding the vacation from being counted in the second period of two months, at the end of which, according to the 4th and 16th Orders, of April, 1828, the Defendant may move to dismiss for want of prosecution. The 26th Order of December, 1823, makes no difference in that respect.

Mr. *BACON* moved, on behalf of a defendant, to dismiss the bill for want of prosecution. The answer of the Defendant had been filed on the 24th of May, 1843, and, no exceptions being taken, would have been deemed sufficient on the 18th of July; (Order IV. of April, 1828); and more than two months had since elapsed. Order. XVI. (amended) of April, 1828.

 1843.—*Goldsworthy v. Crossley*.

[*640] *Mr. *Walker*, contra.—The motion to dismiss is premature, for the Plaintiff may obtain an order to amend his bill, at any time within six weeks after the answer is to be deemed sufficient. Order XIII. (amended) of April, 1828. And the time which elapsed between the 20th of July (which was the last seal after Trinity Term) and the first seal before Michaelmas Term, —or there being no seal before Michaelmas Term, the first day of that term (a) is not to be reckoned, in computing the time allowed to the Plaintiff to amend. Order XIX. (amended) of April, 1828. The Plaintiff is therefore still entitled to an order to amend; and until that time has expired, the Defendant is not at liberty to serve a notice of motion to dismiss for want of prosecution. Order XXVI. of December, 1833 (b).

Mr. *Bacon*, in reply.—The Plaintiff cannot add the six weeks during which he might obtain an order to amend, to the two months which elapses before the answer is deemed sufficient, and thereby make one period, excluding the long vacation. The two months is a distinct period, independent of any other; and when the two months expired, all the subsequent time, whether in term or vacation, must be counted. *Marriott v. Tarpley* (c), *Barnes v. Tweddle* (d).

VICE-CHANCELLOR :—

The answer in this case was filed the 24th of May, and must, according to the 4th Order of 1828, have been deemed sufficient at the end of two succeeding months, which expired before the last seal after Trinity term. The Plaintiff, however, con-

[*641] tends that, inasmuch *as he is allowed by the practice of the Court to obtain an order to amend within six weeks from that time; and as, by the 19th Order, the vacation is not to be reckoned in the computation of time which is allowed to a party for amending any bill, he is therefore entitled to a period of six weeks to amend his bill from the time when the answer was to be deemed sufficient, in addition to the long vacation. I do not accede to that argument. The cases of *Marriott v. Tarpley*, and *Barnes*

(a) 10 Sim. 484.

(c) 8 Sim. 18.

) See *Gully v. Van Bodicoats*, 5 Sim. 668.

(d) 10 Sim. 481.

1843.—*Bamford v. Bamford*.

v. Tweddle, shew that the effect of the 19th Order is only to prevent the intermediate vacations to which it refers from being reckoned in the two months allowed by the 4th Order. In the present case the two months were complete before the last seal; and that being so, the second period of two months would run notwithstanding the vacation.

[The Plaintiff, after unsuccessfully arguing against the motion, on the merits, ultimately entered into the usual undertaking to speed.]

**BAMFORD v. BAMFORD*.

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1843: 10th and 13th November.

If in the prosecution of inquiries under a reference to the Master, commission to examine witnesses abroad be necessary, an application must be made to the Master for his certificate, before applying to the Court for the commission.

Semble, the motion for the commission, on the Master's certificate, is of course.

IN the course of the proceedings, under a reference to the Master, to inquire, among other things, when a certain person died, the Plaintiff moved the Court, upon notice, for a commission to examine witnesses abroad. No certificate of the Master, that the commission was necessary, had been obtained.

Mr. *Roupell* and Mr. *Romilly*, for the motion, said that a commission, to be executed in the country, issued upon the certificate of the Master; but a commission abroad could only be obtained by application to the Court in the first instance.

Mr. *Kee* and Mr. *Rogers* opposed the motion, as irregular. The application ought to have been made to the Master, and, upon his certificate, the motion would have been of course. There was no such distinction, as was suggested, between commissions at home and abroad. 2 Dan. Ch. Pr. 526.

THE VICE-CHANCELLOR said, that he had communicated with

 1843.—*Simmons v. Wood.*

some of the Masters on the point, and they all agreed in stating that whenever it was necessary to ascertain any fact respecting which a reference had been directed to them, and the evidence of witnesses abroad was required, the commission issued on the certificate of the Master, without any previous application to the Court.

He had also been furnished by the Registrar (a) with [*643] several cases, in which the Court had ordered the "commission to issue, for the examination of witnesses abroad, sometimes upon motion of course, and sometimes upon motions on which the other parties appeared; but in all these cases, the order proceeded upon the certificate of the Master (b). It appeared, therefore, that an application ought to be made to the Master, and that the motion was regular.

Motion refused, with costs.

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*SIMMONS v. WOOD.

1843: 31st August, 4th September.

Bill ordered to be taken pro confesso in vacation, under the statute 1 Will. 4, c. 36, s. 15, rule 2.

Where a defendant, who is in custody for contempt for not answering the bill, has been brought up and remanded, under the stat. 1 Will. 4, c. 36, s. 15, the two months and six weeks, given by the 13th rule, is not interrupted by, but will

(a) Mr. Monro.

(b) *Bolingbroke v. Wenck*, M. R., 1 August, 1704. After decree for an account on the Master's certificate, commission ordered to the "Island of Virginia," on the motion of the Plaintiff, Defendant appearing. Reg. Lib. A., 1703, fo. 509. *Folkes v. Berney*, M. R., 6 March, 1732. After decree for an account, and on the certificate of the Master, on motion of course, commission ordered to examine witnesses in Barbadoes. Reg. Lib. A., 1732, fo. 169. *Richardson v. Hamilton*, L. C., 20 November, 1735. After decree, upon the motion of the Defendant, the Plaintiff appearing, on the certificate of the Master, commission to Pennsylvania. Reg. Lib. B., 1735, fo. 29. *Creuze v. Michell*, L. C., 8 November, 1787. After decree, upon motion of course, on the Master's certificate, commission to France. Reg. Lib. A., 1787, fo. 1. Like orders, of course, on the Master's certificate. *Newton v. Bradshaw*, M. R., 28 February, 1803, to the West Indies. Reg. Lib. B., 1802, fo. 200. *Cox v. Cox*, V. C., 23 December, 1834, Id. Reg. Lib. A., 1834, fo. 214. *Earl Nelson v. Lord Bridport*, M. R., 16 March, 1843; to Palermo, Reg. Lib. A., 1842, fo. 771. See also *Seton*, on decrees, p. 18.

1843.—*Simmons v. Wood.*

run in, the vacation, although, if the thirty days allowed by the 5th rule, for first bringing the defendant up after he is actually in custody, should expire in vacation, that time is extended to include the four first days of the following term.

A BILL of foreclosure. On the 10th of November, 1841, when the bill was filed, the Defendant was in custody, under process of contempt, at the suit of other persons. The bill was afterwards amended, and a subpoena to appear to and answer the amended bill, served on the Defendant, in the Queen's Prison, on the 14th of February, 1843. On the 30th of March, the Plaintiff obtained an order for liberty to enter an appearance for the Defendant, and such appearance was accordingly entered on the 6th of April. On the 26th of May, an attachment for want of answer to the amended bill was lodged against the Defendant, with the Marshal of the Queen's Prison. No answer having been put in by the Defendant, an order was obtained, on the 31st of July, for a writ of habeas corpus cum causis, directed to the keeper of the Queen's Prison, to bring up the Defendant to the bar of the Court, to answer his contempt, in not putting in his answer to the bill; and he was accordingly, on the 2nd of August, brought up to the bar of the Court; and by the order of the Master of the Rolls (a) of that date, reciting that the Defendant still persisted in his said contempt, he was remanded to the Queen's Prison until he should fully answer the bill, clear his contempt, and the Court make other order to the contrary.

By an order of the *Vice-Chancellor*, dated the 28th of August, a writ of habeas corpus cum causis was issued, directed to the keeper of the Queen's Prison, to bring the Defendant to the bar of the Court, on the 31st of August, to answer his said contempt, and the clerk of records and writs was ordered to attend at [*645] the same time, with the record of the Plaintiff's bill in order to have the same taken pro confesso against the Defendant. On the 31st of August, the Defendant being brought up pursuant to the order,

Mr. *Cankrien* moved that the bill might be taken pro confesso, under the statute 1 Will. 4, c. 36, s. 15, rule 2.

(a) The name was marked for the Rolls.

1843.—*Simmons v. Wood*.

VICE CHANCELLOR (a) :—

I have read the statute, 1 Will. 4, c. 36, with a view to the points which were submitted to me on Thursday last. It does not appear to me that the 5th and 13th rules of section 15 of the act, will be inconsistent with each other, in consequence of my holding that a bill may be taken pro confesso, during the vacation, under the 2d rule. In order that a bill may be taken pro confesso under the statute, the Defendant must be brought to the bar of the Court, under process of contempt, for not answering the bill, and have been committed or remanded back to the prison of the Fleet, and (having been so committed or remanded) the Defendant must again be brought up by habeas corpus, (not sooner than twenty eight clear days after his being so committed or remanded), in order that the bill may be taken pro confesso against him. The 5th rule requires that the Defendant shall be brought to the bar of the Court, under process, to answer his contempt, (i. e., the first occasion of his being brought up), within thirty days from the time of his being actually in custody; and if the last of those thirty days shall happen out of Term, then within the four first days of the ensuing Term. The twenty-eight clear days (which under the 2nd rule must have run before the Defendant can be brought up by habeas corpus a second time, to have the bill taken pro confesso against him) run from the day on which the Defendant was committed or remanded on the first occasion of his being brought up. It follows, therefore, that where the last of the thirty days (rule 5) happens in vacation, and the Defendant has not been brought up and remanded, the period within which the Plaintiff may be able to take the bill pro confesso cannot commence until the ensuing Term. But where the Defendant has been regularly brought up and remanded, there is nothing in the act which in terms prevents the two months and six weeks, mentioned in the 13th rule, from running without interruption during the vacation. In the case now before me, the Defendant was brought up and remanded by an order at the Rolls,—the regularity of which order cannot be questioned before

(a) The application occurring during the long vacation, his Honor directed the judgment to be delivered out to the parties, in writing, on the above date.

 1843.—*Drake v. Drake.*

me ; and, assuming that order to be regular, the two months and six weeks computed without interruption, will expire on the 6th of September instant. If in these circumstances, the Defendant should apply for discharge, after the two months and six weeks shall have expired, and the Plaintiff could not successfully oppose his application under the 12th rule, there is certainly ground for contending in a case, in which the liberty of the subject is concerned, that the order for the Defendant's discharge should be made in the vacation. I am informed that Lord *Langdale* has so decided in a case before him, since Trinity Term ; if so, the argument for the Plaintiff, that the bill may be taken pro confesso during the vacation can scarcely be resisted. I think it right, therefore, to make a decree for taking the bill pro confesso ; *and if my judg- [*647] ment upon the construction of the act should be erroneous, the defendant may discharge it without being obliged first to clear his contempt.

PLAINTIFF'S bill to be taken pro confesso. Account of mortgage debt and costs. Usual order of foreclosure, in default of payment.

DRAKE v. DRAKE.

1843 : 8th November.

The Defendant may, by answer, decline answering, under the 38th Order of August, 1841, although the objection to answer is not applicable to any interrogatory in particular, but is founded on the bill, being demurrable.

THE bill in substance sought only discovery from the Defendant, for the purposes of evidence in ejectment ; but by the addition, in the prayer of process, of the word "decree," which is inapplicable to a bill of discovery merely, (*James v. Herriott (a)*), it was rendered in form a bill for relief, and, as a bill for relief, it was admitted to be demurrable. The Defendant put in an answer, but

(a) 6 Sim. 428.

 1843.—*Drake v. Drake*.

left most of the interrogatories unanswered. The Plaintiff excepted, and the Master reported the answer to be insufficient.

The Defendant excepted to the report.

Mr. *Cooper* and Mr. *Selwyn*, in support of the exceptions to the report, relied on the Order XXXVIII. of the 26th of August, 1841, and cited *Tipping v. Clarke (a)*. The Defendant might have protected himself from answering the bill by a general demurrer, and as he might have so protected himself, the 38th Order enables him, by answer, to decline answering.

Mr. *Barrett* for the plaintiff.—If the order is to receive the construction which is suggested, the restrictions as to the time and form in which a party may demur will be nugatory. Instead of being limited to twelve days for putting in a general demurrer, and being required to observe a strict form for that purpose, admitting the truth of the bill, the Defendant may gain at once the time which he would have for answering,—the benefit of a general demurrer,—and the advantage, at the same time, of traversing the facts alleged by the bill. So extensive an alteration of the practice of the Court could not have been contemplated as the effect of the 38th Order. If the objection to answer is to have the effect of a demurrer, the objection ought at least to be taken on a form not less definite; and so that the parts of the bill, to which it is intended to apply, should be distinctly specified.

THE VICE-CHANCELLOR, referring to a similar point in the case of *Tipping v. Clarke (a)*, said, it was admitted in this case that the bill was demurrable. So far as discovery sought from a Defendant would expose him to penalties, or be a violation of professional confidence, or fall within the other excepted cases, the Defendant might have declined answering before the 38th Order was made, and the Master would have considered the objection. The 38th Order was

(a) *Ante*, p. 383.

(b) *Ante*, p. 392. See points on the Law of Discovery, p. 98, 99. ed. 2. See *Ward v. Ward*, 3 Hare, 411.

1843.—Ambrose v. Nott.

made to meet the case where the Defendant could not, without making his defence by way of demurrer, (if a demurrer was applicable), protect himself from answering. From the inconvenience of being compelled to try all such questions on demurrer, in order to decide on the sufficiency of the answer, it was thought right that the Defendant, although he answered, should be at liberty to protect "himself from discovery in a form in which he [*649] might have the judgment of the Master on the exceptions. If the Defendant could refuse to answer "any interrogatory, or part of an interrogatory," he might do so as to every interrogatory in succession falling within the same objection. The circumstance that the time for demurring had expired, did not deprive him of the benefit of the objection in this form.

Exceptions to the Master's report allowed.

AMBROSE v. NOTT.

1843 : 15th and 22nd June.

A bill by a landlord against his tenant for specific performance of an agreement for a lease to be taken by the latter, and an action by the landlord against the tenant for use and occupation of the premises during a part of the term:—*Held* to be proceedings for the same matters, so far as the object of the suits was co-extensive.

THE Plaintiff filed his bill against the Defendant for the specific performance of an alleged contract, whereby the Defendant had agreed to take from the Plaintiff a lease of certain premises for a term of years, at £65 a-year. The Defendant entered into possession of the premises, not, as he stated by his answer to the bill, under any agreement for a lease, but only as tenant from year to year. The Plaintiff brought an action against the Defendant for use and occupation. The Defendant thereupon, on the 25th of May, obtained the common order for the Plaintiff to make his election in which Court he would proceed (a). The Plaintiff gave

(a) Order I., 9th May, 1839.

1843.—*Ambrose v. Nott.*

notice of a motion to discharge the order for election with costs. He afterwards gave a second notice of motion, that upon the hearing of the motion, under the first notice, in case the Court should then be of opinion that the Plaintiff was not entitled to have the order for election discharged, that the Plaintiff might be at liberty to elect forthwith to proceed in equity, and that the Defendant might be ordered to pay to the Plaintiff the sum of 110*l.* 5*s.*, being the amount of the rent then due for the use and occupation of the premises; and that he might be ordered to pay the sum of 32*l.* 10*s.* on the 29th day of September, and the 25th day of March, in each year thenceforward, until the hearing or the further order of the Court; or that the Defendant might be ordered to pay the said 110*l.* 5*s.*, and also the said 32*l.* 10*s.*, half-yearly, into Court; or that it might be referred to the Master, to inquire and report what would be the proper sum to be paid by the Defendant for the use and occupation of the premises; and that the Defendant might be ordered to pay the same to the Plaintiff or into Court.

Mr. *Romilly* and Mr. *Sparling*, for the motion, argued that the action at law for use and occupation had no connexion with the suit in equity, which was to compel the Defendant to execute the lease. The matters were perfectly distinct.

Mr. *Tripp*, for the Defendant, contended that the Plaintiff could not be entitled both to the relief in equity, and to the subject of his action. Supposing the Plaintiff should recover at law, and obtain a decree in equity, the relief in equity must be reduced to the extent in which the relief had been obtained at law. *Carrick v. Young* (a); *Fennings v. Humphery* (b); *Carwick v. Young* (c).

VICE-CHANCELLOR:—

The motion in this case is made to discharge the order for election on the ground that the proceedings at law and in equity [651] are for distinct matters. The Plaintiff does not complain of any irregularity in the order, but simply insists upon the

(a) 4 Madd. 437.

(b) 4 Beav. 1.

(c) 2 Swann. 239.

 1843.—*Ambrose v. Nott.*

merits, that he ought to be relieved from it. This is the point which the Court usually refers to the Master in the first instance; and it is upon the report of the Master that the question comes regularly to be determined by the Court. *Carrick v. Young (a)*. There are, no doubt, several cases to be found in which the point has been brought before the Court before it had gone to the Master; but in those cases, some other matter calling for the decision of the Court has been mixed up with the simple question of the identity of the subject matter of the suits. In this case that alone is the point in dispute upon the first motion.

It is not, however, on the ground that, in point of regularity, the question should first be referred to the Master, that I refuse the motion. Upon the case before me, I should feel bound to hold that the matter of the double proceedings is the same. I am of opinion that it is a proceeding in one Court, upon one ground, for the recovery of part of that which is sought in the other Court on a different ground. I must refuse the first motion, with costs.

[Upon the second motion, his Honor said, that as the defendant was, upon the admission in the answer, liable for use and occupation of the premises, if not for rent, under the alleged agreement for the lease, and he still retained possession, it was proper, and could be no wrong to the defendant, that the amount of the rent due under the agreement should be brought into Court, and he ordered the same to be accordingly paid in by *the Defendant— [*652] the amount to be settled by the Master if the parties differed, and the costs of the second motion to be costs in the cause (b).]

(a) *Ubi supra*. And see *Amory v. Brodrick*, Jacob, 530. See the forms of the common orders for election. *Hand. Sol. Assist.* pp. 16, 41, 55, 57.

(b) See 1 *Sugd. Vend. & Pur.* 357. ed. 10.

 1843.—Church v. Marsh.

CHURCH v. MARSH.

1843: 21st July, 18th, 20th, and 24th Nov.

An order for leave to sue in forma pauperis is not inoperative, although it is not served where there is no mala fides in withholding it, and no step has been taken in the cause inconsistent with the order. *Semble*, the same rule applies to orders of course, generally.

THE Plaintiff filed his bill the 13th of June, and on the 14th of June obtained an order for leave to sue in forma pauperis, but did not serve the Defendant with the order until the 26th of June, previously to which day the Defendant had put in a demurrer to the Plaintiff's bill. The Defendant now moved that the Plaintiff might be ordered to pay such part of the costs of the suit as had accrued up to the 26th of June, when the order, granting leave to the Plaintiff to sue in forma pauperis, was served upon the Defendant, together with the costs of the motion.

Mr. Romilly, for the Defendant, submitted that the order had no effect until served. *Anon.* (a); *Partridge v. Haycraft* (b); *Morris v. Owen* (c); *Lorimer v. Lorimer* (d); *Young v. Smith* (e); *Wynne v. Jackson* (f); *Leyburn v. Green* (g); *Peace v. Hodgson* (h); *Taylor v. Harrison* (i); *Petty v. Lonsdale* (k); *Dearman v. Wych* (l); *Pearce v. Gray* (m); *Davenport v. Davenport* (n); *Doe d. Ellis v. Owens* (o)

 [*658] *VICE-CHANCELLOR:—

The expression that an order of course is no order until it is served, must be understood in this sense, that if the other party takes a step before the order is served, that step being in itself regular, the order, which had been obtained and not served,

(a) 7 Ves. 222.

(d) 1 J. & W. 287.

(g) 2 Russ. 577.

(k) 4 Myl. & Cr. 545.

(n) Phill. 124.

(b) 11 Ves. 578.

(e) 3 Madd. 196.

(h) 7 Sim. 347.

(l) Id. 550.

(o) 10 Moo. & W. 514.

(c) 1 V. & B. 523.

(f) 2 S. & S. 226.

(i) 8 Sim. 21.

(m) 4 Beav. 127.

1843.—Church v. Marsh.

cannot afterwards be acted upon, if it will interfere with the step so taken. In this case it has not been suggested, nor could it be, that the Defendant has done any thing inconsistent with the order; and if not, and if the order has been served with reasonable diligence, I do not see why it should not prevail. I know of no rule of practice against it. If the Plaintiff had kept the order, and not disclosed it to the Defendant for a great length of time, so that, after the Plaintiff had obtained it, the Defendant had been led into expenses from the circumstance of its not being served, or the delay in serving the order had been such as to raise a case of *mala fides*, the case might be different. I do not, however, know that, as a matter of principle, a court of justice has ever recognised any distinction as to the expense which a dives defendant pays in a cause, and that which he pays in a pauper cause. In each case all proper steps should be taken, and no others.

Before the expiration of the time allowed for filing a demurrer, the order in this case was served. What had the Defendant done in the mean time? He had taken the copy of the bill, which he must have done whether he was served with the order or not. I do not inquire whether the costs of putting in an answer or a demurrer are the greater. I do not proceed upon the comparative expense. I go upon this,—that the service of the order is regular, provided it is made while the cause is in Court, and that the Plaintiff is entitled to the benefit of the order, so [*654] long as nothing is done in the cause inconsistent with the existence and effect of the order, and no *mala fides* can be imputed to the Plaintiff. I am of opinion, that where an order is obtained and not served, the distinction between the cases in which it is operative, and those in which it is of no effect, depends upon the fact of whether the subsequent steps have been consistent or inconsistent with the order.

Motion refused, with costs.

Mr. *Cooper* and Mr. *Watson*, for the Plaintiff, were not heard.

A demurrer to another bill, by the same parties, came on for argument, and was allowed. The order to *suo in forma pauperis* in this case had been obtained, but not served.

 1843.—*Church v. Marsh.*

Mr. *Romilly* asked that the demurrer might be allowed, with costs, as in the case of a dives plaintiff, on the ground that the order had not been served. He cited *Ballard v. Catting* (a),—an authority to which his notice had been called since the argument.

Mr. *Cooper* and Mr. *Watson*, contra.

Where the order for leave to sue in forma pauperis has not been served, and is not rendered inoperative by any subsequent step in the cause, it is in the discretion of the Court either to give costs to the pauper, or to order him to pay them, as the case may be.

VICE CHANCELLOR :—

I have made inquiries to ascertain the practice in these cases. I find that, in a case before Lord *Langdale*, a party who sued in forma pauperis, prosecuted the suit to the hearing without disclosing that he had the order for leave to sue in forma pauperis, and produced it at the last moment, and claimed to be excused from the payment of costs, and Lord *Langdale* there held that [*655] the case was within the discretion of the Court, and refused to give the pauper the benefit of the order. I should follow the course pursued in that case in the like circumstances, and for this obvious reason :—the rule of the Court, as settled by the case of *Ratray v. George* (b), followed by *Roberts v. Lloyd* (c), and recognised, though not followed in *Stafford v. Higginbotham* (d), is, that, where the pauper succeeds, it is in the discretion of the Court, whether he shall receive pauper or dives costs. If a pauper were allowed to keep an order in his pocket, and still insist upon the benefit of it, he would, if he succeeded, as a matter of course, claim dives costs ; whilst, if he failed, he would, for his own protection, produce the order. That is a fraud upon the Court or the party. The defendant has a right to know whether he is contending with a pauper or not. I shall follow Lord *Langdale's* decision in similar cases ; but I am of opinion that there is no rule *positivi juris*, as was contended, that an order to sue in forma pau-

(a) 2 Keen, 606.
(c) 2 Beav. 376.

(b) 16 Veq. 232.
(d) 2 Keen, 147.

 1844. — *Osborne v. Foreman*.

peris is inoperative only because it has not been served. I cannot find any authority, either from any officer of the Court, or in any reported case, which leads to that conclusion. In a case where there is no ground for suspecting mala fides, and no improper delay, I must (though reserving to myself a discretion which I think the Court has in such cases) *prima facie* think a pauper entitled to the benefit of the order. In this case the Defendant had notice that the Plaintiff was a pauper both from the bill and from the subpoena. This is admitted.

[His Honor allowed the cause to stand in the paper, to give the Defendant an opportunity of bringing before the Court any case of mala fides, with respect to the omission to serve the order. No such case was shewn, and the order was made as in a pauper cause.]

 *OSBORNE *v.* FOREMAN.

[*656]

1844: 11th and 15th January.

Under the 30th Order of August, 1841, the trustees of real estate by devise, having the powers mentioned in the order, represent the persons beneficially interested in such real estate, (so as to make it unnecessary that persons having charges thereon should be parties), not only in suits by persons claiming adversely against the estate, but also in suits by some of the persons beneficially interested, and where the conduct of the trustees is in question.

The Court will not, upon the argument of the objection for want of parties, under the 30th and 39th Orders of August, 1841, order that persons beneficially interested be made parties : such order, if made, will not be made until the hearing of the cause

THE testator gave and devised all his real estate to trustees, upon trust for sale, with power to give discharges for the proceeds of the sale, and for the rents and profits of the estate, and he directed that his said trustees should stand possessed of the monies to be produced by such sales, together with the residue of his personal estate ; after payment of debts, upon trust to pay certain annuities to persons therein named for their lives, and then to pay various legacies bequeathed by his will, and as to the remainder, subject to such legacies and annuities, in trust for certain classes of persons thereby

 1844.—*Osborne v. Foreman*.

described. The bill was filed by one of the residuary legatees against the trustees, impeaching their conduct in several particulars, and praying that the trusts might be executed under the direction of the Court. The other residuary legatees were made Defendants, but the pecuniary legatees, and the annuitants, were not parties.

The trustees by their answer said, that besides the Plaintiff, and persons thereinbefore named, (the other residuary legatees), there were various legatees and annuitants under the will, whose legacies though unpaid, were charged generally on the testator's estate, and the Defendants submitted whether such persons were not necessary parties to the suit.

The cause was set down for argument under the Order XXXIX. of the 26th of August, 1841, upon the objection for want of parties.

[*657] *Mr. Roupell* and *Mr. C. M. Roupell*, for the Plaintiff, submitted that the case was within the Order XXX. of the 26th of August, 1841, placing legatees whose legacies are charged on real estate, in cases like the present, in the same situation as legatees whose legacies are payable wholly out of personal estate.

Mr. Tinney and *Mr. Goodeve* for the trustees.

The cases in which the order provides that it shall not be necessary to make the persons beneficially interested in real estate parties to the suit, are the cases in which the trustees represent them. Now, in what cases can the trustees be properly said to represent the parties beneficially interested? Not in cases where there is a dispute among those persons, but in cases where creditors, or others, make adverse claims against the estate. The argument of the Plaintiffs in the present case must be, not that the trustees represent the parties beneficially interested, *i. e.* the whole body of them, for some of them are Plaintiffs, whom they cannot, and others are Defendants, whom they do not for the purposes of this suit represent; but the argument must be that they represent some of the parties beneficially interested and not others; and that case is not within the order. Some analogy may be found in the construction put on the

 1844.—*Osborne v. Foreman*

representative character of the public officer of a banking company: under the act 1 & 2 Vict. c. 96, the public officer is made to represent the bank; but in *Seddon v. Connell*(a), it was held that he could not represent some of the members of the company, in a suit brought by the others. In this case it is impossible to say, with any truth, that the trustees do represent the persons beneficially interested for the purposes of this suit; for one object of the suit is, to impeach the conduct of the trustees, and in their [*658] defence in this respect they can properly represent none of the other parties.

They argued also that from the special circumstances of the case appearing upon the answer, the Court ought, under the last clause of the order, to direct the other persons to be made parties.

VICE-CHANCELLOR :—

The first branch of the 30th order applies in terms to all suits. The words are :—“That in all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning estate represent the persons beneficially interested in such personal estate.” Now, this is a suit *prima facie* within the order: it concerns real estate: the trust is created by devise: and the trustees are competent to sell and give the required discharges.

It is said, that, although the general expressions in the first part of the order would comprehend the present case, yet the second branch of the order shews, by necessary implication, that particular suits only, and not all suits, are intended. The second branch of the order says, “and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit.” The trustees contend, upon these

(a) 10 Sim. 58.

1844.—Osborne v. Foreman.

words, that the only suits contemplated by the order are [*659] suits instituted by *persons claiming altogether adversely to the devise, and that suits in which the residuary legatees must all be parties cannot have been intended. It would be very extraordinary, if the order could have any such effect; for if the trustees can with safety represent all those beneficially interested in the real estate, where the claim is wholly paramount and adverse to their interest, it would be strange that they should be able to represent the interests of the annuitants and pecuniary legatees, where the bill is filed by persons admitting the priority of those parties and seeking relief, subject and without prejudice to their claims. Still, if the words of the order have that meaning, I must give effect to it; but I think that is not their meaning. If the order had stopped at the end of the first branch of it, I do not think there could have been any reasonable argument for the necessity of making pecuniary legatees parties to the suit. But subsequent words were introduced to remove the doubt they appear to have raised. They have reference to the old practice, and are merely inserted as explanatory of the previous words, for the purpose of shewing that, with respect to parties, cases concerning real estate, the first branch of the order, are to be assimilated to the old practice in cases of personal estate.

Another point insisted upon was, that, inasmuch as by the third branch of the order, "the Court may upon consideration of the matter, on the hearing, if it shall so think fit, order such persons to be made parties," I should now decide, on the circumstances of this case, whether the absent legatees ought to be parties. I do not think I ought now to decide that point. The words, "on the hearing," were introduced advisedly. It is quite clear that, in many cases, it would be impossible to give an opinion [*660] upon the subject before the hearing. *Suppose the Defendant himself to suggest a given statement of facts, not disclosed in the bill, and to insist that according to those facts, certain persons ought to be parties: that statement may happen to be true, but the Plaintiff, in this stage of the cause, has a right to say he can prove those facts by his evidence in the cause. So, in

Memoranda.

other cases, the whole of the facts stated in the bill may be admitted, or not, by the answer, and the Court might say, according to the admitted state of things, that certain persons are necessary parties; but the bill may be amended, and the case, with respect to the suggested parties, altogether altered. This is, therefore, not the time for giving any opinion upon that point, although I do not say the Court may not do so, to save expense, in a case where the parties are agreed upon the circumstances, and concur in desiring to have the decision of the Court.

THE Court, upon hearing the objection, does not make any order thereupon, but does order that the costs be costs in the cause.

MEMORANDA.

IN Michaelmas Term, 1842, Sir *John Cross*, Knight, [*661] one of the Judges of the Court of Bankruptcy, died. In the same Term, the Right Honorable *Thomas Erskine* resigned the office of Chief Judge of the Court of Bankruptcy, and was succeeded by the Right Honorable Sir *J. L. Knight Bruce*, Vice-Chancellor.

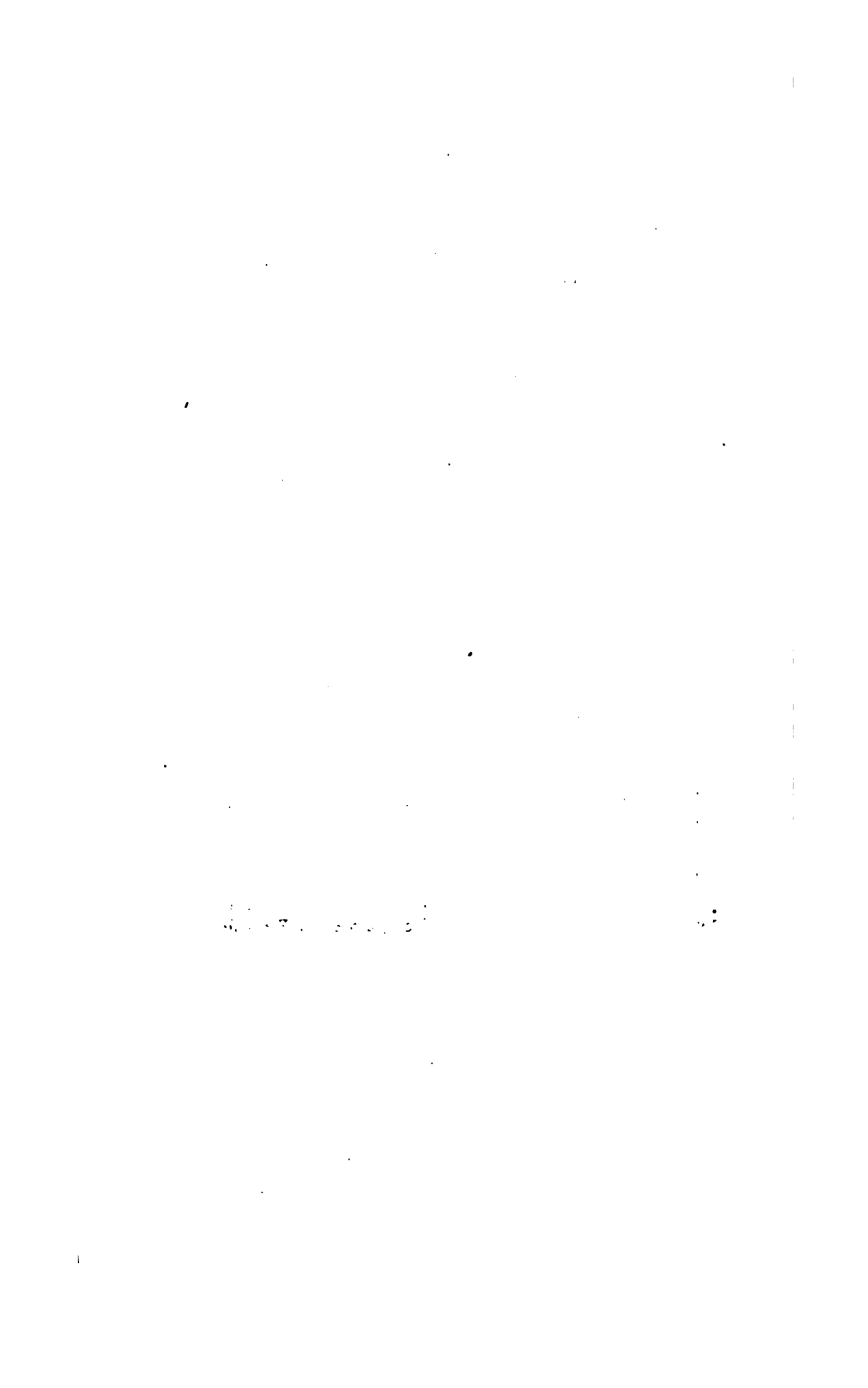
In the Vacation before Easter Term, 1843, *Nathaniel Richard Clarke*, Esq., and *John Barnard Byles*, Esq., Barristers at Law, were called to the degree of Serjeants at Law.

In April, 1843, Sir *G. A. Lewin*, the Honorable *J. C. Talbot*, *S. Martin*, Esq., *J. A. Roebuck*, Esq., and *W. H. Watson*, Esq., were appointed Queen's Counsel; and Serjeant *D. C. Wrangham*, was appointed Queen's Serjeant.

Thomas Pemberton Leigh, Esq. was appointed Chancellor of the Duchy of Cornwall, and a Member of her Majesty's Privy Council.

The Honorable *J. C. Talbot* was appointed Attorney-General of H. R. H. the Prince of Wales.

In December, 1843, *John Romilly*, Esq., was appointed Queen's Counsel.



AN
INDEX
TO THE
PRINCIPAL MATTERS.

ABSCONDING.

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Defendant residing out of the jurisdiction, deemed to have absconded to avoid the process of the Court, under the 1st Order of the 11th of April, 1842. *Hele v. Ogle,* 623

ABSOLUTE INTEREST.

The testator by his will desired that everything, during the life of his wife, should remain as it was, for her use and benefit; and after her decease he gave his real estate to his male heir, and his personal estate to his children, adding, that he gave the above devise to his wife, that she might support herself and her children, according to her discretion and for that purpose:—*Held*, that the widow took an absolute interest for her life, in the real and personal estate. *Thorp v. Owen,* 607

ABSTRACT.

See NOTICE, 1.

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ADDRESS FOR SERVICE.

See SERVICE, 1.

The omission by the Plaintiff to endorse an address for service on the writ, as directed by the 20th Order of the 26th of October, 1842, does not of necessity make the writ void; but the Court will, in the mean time, so deal with the proceedings which are under its control, by staying process or otherwise, as to give the party the benefit of the 20th Order. *Price v. Webb,* 511

ADMISSION OF ASSETS.

See CREDITOR'S SUIT, 3.

ADMINISTRATION.

See COSTS, 6.

DECREE.

1. Administration of an estate, where a creditor had obtained judgment upon a plea of plene administravit by two of the executors, and a confession of assets to a certain amount by another executor,—such assets consisting of money in the hands of bankers not reached by the execution,—which the two executors prevented from being paid upon the cheque of the third executor to the judgment creditor, and which was afterwards paid into Court. *Gaunt v. Taylor,* 413

2. An executor, who, in an action at law by a creditor of the testator, has pleaded according to the truth of the

case, is, when the assets are taken from him, and administered in equity, entitled to the protection of the Court against any personal liability in respect of such plea. *Id.*

3. A party to whom letters of administration have been granted, as the attorney of the person entitled to the grant, and for the use and benefit of such person, is liable to be sued in respect of the estate by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right. *Chambers v Bicknell*, 536

4. A testator directed his debts to be paid, and appointed executors in *England*, and other executors in *Italy*, directing the English executors to transmit the residue to the Italian executors, and bequeathing such residue amongst classes of persons alleged to reside in *Italy*:—*Held*, that the sum to be paid over, being the residue, after payment of debts, the Italian executors must be regarded as simply trustees of that fund, and not as executors holding it charged with debts; and that, therefore, inquiries must be directed to ascertain the persons beneficially entitled to the fund, under the bequest. *Weatherby v. St. Giorgio*, 624

ADVERSE POSSESSION.

A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer.—*Held*, that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Will. 4, c. 27, s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner. *Hyde v. Dallaway*, 528

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FORECLOSURE.

1. An affidavit which does not express that the deponent "made oath,"

is not admissible. *Phillips v. Prentice*, 542

2. Affidavits filed after the answer cannot be read on a motion for a special injunction, in support of which no affidavits had been filed before the answer; and the rule is the same whether notice of the motion was given before the answer was put in or afterwards. *Manser v. Jenner*, 599

AGENT.

See DISCOVERY, 2.

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See CONSTRUCTION, 2, 3.

AMENDMENT.

See TIME.

1. An order for leave to amend, not served, does not prevent the Defendant from demurring to the bill. *Price v. Webb*, 515

2. An order for leave to amend operates from the time of service only, and therefore an intermediate step taken by the Defendant, after the order is made, and before it is served, is regular. *Id.*

3. A Plaintiff amending his bill after answer, by adding new Defendants, does not thereby acquire a right to make a further amendment against the original Defendants, under the 13th Order of April, 1828, within six weeks after the answers of the new Defendants are to be deemed sufficient; but the time during which the Plaintiff may amend, under that order, must be counted from the date when the last answer of the original Defendants is to be deemed sufficient. *Bertolacci v. Johnstone*, 633

4. An application for leave to amend after answer, not founded upon the 13th Order of April, 1828, must be supported by affidavits, not confined to the facts required to be shewn in cases within that order, but sufficient also to satisfy the Court that from the occasion and necessity for the proposed amendments, the leave ought to be given. *Id.*

5. The right of a Plaintiff to call for an answer to his amended bill, does not depend on the fact of whether the order for leave to amend is made upon the

undertaking to pay costs to the Defendant, or to amend the Defendant's office copy; and, therefore, where the bill was amended under an order whereby the Plaintiff undertook to amend the Defendant's office copy, a motion to set aside a subpoena requiring the Defendant to appear to and answer the amended bill, was refused. *Breeze v. English*, 638

ANNUITANT.
See PARTIES, 2, 5.

ANSWER.
See AFFIDAVIT, 2.
COSTS, 2.
DISCOVERY, 2.
INJUNCTION, 1.
JURAT.
PLEADING, 1.
PRO CONFESSO, 1.

1. The answer of a married woman, who is an infant, cannot be taken either separately or jointly with her husband, until she has had a guardian assigned. *Coleman v. Northcote*, 147

2. The 38th Order of August, 1841, enabling a Defendant by answer to decline answering any interrogatory, from answering which he might have protected himself by demurrer, applies as well where the demurrer constituting the protection must have been a demurrer to the relief, as where it would have been a demurrer to the discovery only. *Tipping v. Clarke*, 383

3. Construction of an answer, containing a general denial of the facts charged, in the terms of the charge, with a saving so far as the other statements in the answer admits or explains them. *Ib.*

4. The Defendant may, by answer, decline answering, under the 38th Order of August, 1841, although the objection to answer is not applicable to any interrogatory in particular, but is founded on the bill, being demurrable. *Drake v. Drake*, 647

APPEAL.
See STAY OF EXECUTION.

APPEARANCE.
See BILL OF REVIVOR.
PRO CONFESSO, 2, 4, 5.
SERVICE, 1.

VOL. II.

1. The Court will not make the Order allowing the Plaintiff to enter an appearance for the Defendant, under the 8th Order of August, 1841, after several months have elapsed since the service of the subpoena, unexplained, except upon notice. *Radford v. Roberts*, 96

2. A Defendant against whom it is prayed, that he may be bound by the proceedings, on service of a copy of the bill, under the 23rd Order of August, 1841, may appear gratis before or after he is so served. *Barkley v. Lord Reay*, 309

3. Form of the order for liberty to enter a conditional appearance with the registrar since the 7th General Order of the 26th of August, 1841. *Price v. Webb*, 511

APPOINTMENT.

1. Trustees of a fund, having a power to appoint the same to such one or more of several objects of the power as the trustees should select, appointed the fund to trustees (of whom A., one of the objects of the power, was one,) upon trusts to be declared by a subsequent deed; and by that deed, to which A. and all the trustees were parties, the trusts of the fund were declared to be for the benefit of A. for life, with remainder, in equal shares, amongst four other of the objects of the power, subject to such limitations, in respect of the interests in their respective shares, to be taken as between themselves, their wives and issue, respectively, as A. should appoint. A., by will limited the share of one of the appointees to trustees for the appointee, his wife and children,—the wife not being an (express) object of the original power:—*Held*, that the appointment was an effectual execution of the power,—being equivalent to an appointment to A., and a subsequent and independent settlement by A. of the fund which A. acquired by such appointment. *Goldsmid v. Goldsmid*, 187

2. Devise and bequest of freehold, copyhold, and personal estate, upon trust for sale at the discretion of the trustee, and that the rents, interests, and proceeds should be divided amongst a class, either equally, or in other proportion.

portions as the trustee, having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest, and proceeds for the benefit of such of the class as were unmarried or unsettled, and particularly for the comfortable support of P., (one of the class) who was of weak mind; and in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint having regard to the said intentions. The trustee by deed directed the manner in which the estates should be sold, and the proportions of the proceeds applied, and directed the division thereof amongst the other objects to be postponed until after the death of P., and nominated other persons to execute the trusts which might remain unexecuted at his (the trustee's) death, and directed them to distribute the surplus proceeds of the estates amongst other objects according to their exigencies:—*Held*, that the trustee for the government, of his own discretion, might properly have regard to the directions of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; that the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P., and that the attempt to delegate powers which the trustee could not transfer, did not invalidate the directions in the same deed which he had no power to give. *Hitch v. Leworthy*, 200

3. Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint; and in default of appointment, to their respective executors, administrators, and assigns:—*Held*, that each of the legatees, whether married or unmarried women, were entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund. *Holloway v. Clarkson*. 521

ASSIGNMENT.

See PARTNERSHIP, 1, 5.

ATTACHMENT.

1. Lord Clarendon's General Order, that, after a contempt duly prosecuted to an attachment with proclamations returned, no plea or demurrer shall be admitted but upon motion in Court, does not apply to the process at present substituted for attachment with proclamations—*semble*. *Robinson v. Stanford*, 149

2. A party in a cause who has obtained and served, according to the 12th amended Order of August, 1841, an order that his solicitor shall deliver his bill of costs within a month,—which is disobeyed,—is entitled under the 15th Order of August, 1841, to enforce obedience by the writ of attachment. *Lane v. Oliver*, 97

ATTORNEY.

See ADMINISTRATION, 3.

BANKRUPT.

See COSTS, 6.

BANKRUPTCY.

See JURISDICTION, 1.
POLICY OF INSURANCE, 2.

BILL AND ANSWER.

See EVIDENCE, 1.

BILL TO PERPETUATE TESTIMONY.

Where depositions, taken in a suit to perpetuate testimony, are required to be used in a trial at law, not under the control of the Court, the order is, that the depositions be published, and that the parties may make such use of the same as by law they can. *Attorney-General v. Ray*, 518

BILL OF REVIVOR.

The fact that an appearance has been entered by the Plaintiff for the Defendant, to an original bill, under the 8th Order of August, 1841,—or that an original bill has been taken pro confesso against a Defendant under the 1st Order of April, 1842, is no ground for taking either of those steps on a mere

bill of revivor in the same suit, against such Defendant, without previously going through all the preliminary steps, as in the case of an original bill. *Eltoft v. Brown*, 622

BOND DEBT.

See CREDITOR'S SUIT, 6, 7.

CERTIFICATE.

See COMMISSION, 2, 3.

COLONIAL LAW.

The Courts of this country will apply the general law of this country, being abstractedly just, and not exclusively founded upon any peculiar or technical rule,) to questions relating to lands in a colony, where a different system of jurisprudence prevails, unless it is suggested or shewn that the laws of the colony are different on the point in question; and therefore the mortgagees of an estate in Demerara was held not to be bound to produce his securities for inspection before payment. *Bentinck v. Willink*, 1

COMMISSION.

1. Where the Defendant obtains a commission to examine witnesses under the 17th (amended) Order of April, 1828 the commission must be made returnable the first return of the second term next following the date of the order for such commission. *M'Gregor v. Topham*, 516

2. If in the prosecution of inquiries under a reference to the Master, a commission to examine witnesses abroad be necessary, an application must be made to the Master for his certificate, before applying to the Court for the commission. *Bamford v. Bamford*, 649

3. *Semble*, the motion for the commission, on the Master's certificate, is of course. *Ib.*

CONDITION.

1. The testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support, until she attained twenty-one, or married with the consent of his true-

tees under that age, and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and in case of her death without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards declared by a codicil that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was that she should not marry; and in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder. *Held*, that the limitation over by the codicil, being in general restraint of marriage, was void as to the life-interest of the daughter. *Morley v. Rennoldson*, 570

2. Whether the interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil; *quære*. *Ib.*

CONDITIONS OF SALE.

1. The conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser, should be deemed to be waived:—*Held*, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed. *Blacklow v. Laws*, 40

2. A condition of sale was, that in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor might rescind the contract, on notice and repayment of the deposit to the purchaser; and objections not delivered within fourteen days after delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, and the vendor answered the queries; the purchaser on the same day objected to the answers: the correspondence on the subject of the title continued for several weeks, and then the vendor gave notice that he rescinded the contract:—*Held*, that the continu-

ance of the treaty for the completion of the title, after the first objection of the purchaser, was a waiver of the condition as to the rescinding of the contract.

Morley v. Cook, 106

3. That such a condition of sale ought to be discouraged; and ought not to receive a construction oppressive on the purchaser. *Ib.*

4. That the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition. *Ib.*

5. That the vendor was only bound bona fide to deliver an abstract of such title as he had at the time of delivering it; and so long as the condition remained in force, was not bound to deliver any supplemental abstract of title afterwards acquired; *semble*. *Ib.*

6. Whether the benefit of the condition would not in equity be forfeited by a vendor who designedly delivered an imperfect abstract of the title which he had at the time of delivering it; *quere*. *Ib.*

CONDITIONAL APPEARANCE.

See APPEARANCE, 3.

CONFIRMING REPORT.

The Plaintiff obtaining the order nisi to confirm the Master's report, but not proceeding to make the order absolute, the Defendant may move to confirm the report, and for that purpose the certificate of no cause shewn will be ordered to be entered on his office copy of the order nisi. *Roberts v. Williams*, 151

CONSIDERATION.

The Court may not perhaps enforce the specific performance of a contract for the sale of an estate, where the consideration is uncertain (as a life annuity,) if such consideration be greatly inadequate; but a difference of seven or eight per cent is not such inadequacy. *Bower v. Cooper*, 408

CONVERSION.

Real estate was conveyed to a trustee on trust to permit a mortgagor to receive

the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee should enter into possession of the premises, and, at his discretion, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs (to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the Plaintiffs for life, with remainder over in tail:—*Held*, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. *Bourne v. Bourne*, 35

CONSTRUCTION.

See CONDITIONS OF SALE, 1, 4, 5, 6.

HUSBAND AND WIFE.

LEGACY, 1, 3, 4.

WILL, 1, 2, 3, 4, 5.

1. A married woman having several legitimate children, and one illegitimate child, and being separated from her husband, and enciente with a second illegitimate child, appointed a fund to her illegitimate child then born, reserving a power of revocation, as to a moiety, in favour of any after-born children she might have born of her body. After the birth of the second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund equally between the two illegitimate children:—*Held*, that the after-born children, for whose benefit the revocation might be made, must be taken, in the primary and legal sense, as applying to legitimate children only,—that, therefore, the second illegitimate child was not an object of the reserved power, and could not take under the latter appointment. *Dover v. Alexander*, 275

2. An agreement to sell land, not expressing what interest in it, is construed to mean the whole of the interest of the vendor in the land. *Bower v. Cooper*, 408

3. An agreement to purchase land

for an annuity for the life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity. *Id.*

COPIES.

See PIRACY, 1, 2, 3.

COPY OF THE BILL.

See APPEARANCE, 2.
PARTIES, 1.

1. Verification of the copy of the bill to be served under the 24th Order of August, 1841. *Penfold v. Bouch*, 157

2. Verification of the copy of the bill, served under the 24th Order of August, 1814. *Coleman v. Rackham*, 354

COPYRIGHT.

See PIRACY, 1, 2, 3, 4.

CORPORATION.

See PLEADING, 4.

Some forms prescribed for the government of a corporation may be imperative and others directory only. *Foss v. Harbottle*, 495

COSTS.

See AMENDMENT, 5.
FORMA PAUPERIS.
SOLICITOR, 1, 2.

1. Where a Defendant, having rendered himself liable to be sued, and being sued, offers to submit to all the relief to which the Plaintiff is entitled, the Court will not give the Plaintiff his costs of the subsequent prosecution of the suit. *Colburn v. Simms*, 543

2. A Plaintiff who is entitled to have an account taken of profits unlawfully made by the Defendant, is not bound to accept the statement of the account on affidavit instead of by answer, but may call for an answer from the Defendant, without therefore disentitling himself to the costs in respect of the answer, although he afterwards waives the account. *Id.*

3. Where a plea to the bill is filed, and the plea is overruled, with liberty to amend, and the amended plea is put in and allowed, the Defendant is not entitled to the costs of correcting his own mistake, but is entitled to the costs which he would have had if the plea which was allowed had been the plea which was first filed. *Clayton v. Meadows*, 26

4. Under a general order of taxation, the Master will without any special direction, exercise a discretion as to taxing the costs of informal proceedings. *Id.*

5. On proof of some specific errors and overcharges in an account and bill of costs, inquiries were directed with respect to an account made up—and the balance of which was secured by a mortgage made thirteen years before the bill was filed. *Edwards v. Meyrick*, 60

6. In an administration or creditor's suit against an executor becoming bankrupt or insolvent, and who is, at the same time, indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency will be set off against his debt; and the costs of the same executor incurred in the proper performance of the duties of his trust, after his bankruptcy or insolvency, will be allowed out of the estate. *Samuel v. Jones*, 246

7. Separation of the costs occasioned by a defence, founded on a statement of fact, disproved by the evidence. *Bower v. Cooper*, 408

8. Notwithstanding an order on further directions in a creditor's suit, that the costs of all parties should be taxed as between solicitor and client, and paid out of a fund in Court,—the fund proving insufficient to pay all the costs,—the Court ordered the costs of the executors to be paid in the first place. *Gaunt v. Taylor*, 413

COVENANT.

See MORTGAGE, 2.

CREDITORS.

See PARTIES, 3.

CREDITOR'S SUIT.

1. Inquiries of the propriety of the proceedings proposed to be taken for the beneficial management and realization of the estate of a testator or intestate, will not be directed in a creditor's suit. *Collinson v. Ballard*, 119

2. The Plaintiff in a creditor's suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mortgagee, or a party entitled to a lien on the title-deed. *Christian v. Field*, 177

3. In a suit by a creditor on behalf of himself and all other creditors, if the debt of the Plaintiff be admitted or proved, and the executor or administrator admits assets, the Plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodgate v. Field*, 211

4. A mortgagee may sustain a suit against the executors of the mortgagor, for a sale of the property comprised in the security, and for the payment of any deficiency out of the general estate of the testator—semble. *King v. Smith*, 239

5. A court of equity restrains a creditor from enforcing his legal rights against the estate of his deceased debtor only upon the principle, that the creditor is enabled to bring into equity (with some specified exceptions) all his legal rights, and that the validity of his debt must be determined in equity upon the same principles as at law; and the circumstance, that the creditor is also the Plaintiff in the cause, is not material as to the mode of determining the validity of such debt. *Whitaker v. Wright*, 310

6. In the proof of a bond debt, before the Master, it is not the practice to require an affidavit of the consideration, unless a case of suspicion against the bond is raised. *Ib.*

7. Under a decree in a suit by a bond creditor on behalf of himself and the other creditors on the estate, the executor may, in the Master's office, impeach the validity of the bond upon grounds which were not in issue in the cause at the hearing. *Ib.*

CUMULATIVE LEGACIES.

See LEGACY, 4, 5.

DECREE.

See PARTIES OUT OF THE JURISDICTION.
STAY OF EXECUTION.
VENDOR AND PURCHASER.

Form of decree for taking the accounts in an administration suit, in case all the persons interested should not be parties at the hearing. *Fisk v. Norton*, 381

DEFENDANT.

See ASCENDING.

DEMURRER.

See ANSWER, 2, 4.

On argument of a demurrer, facts not averred in the bill, and which might possibly have been denied by plea, if they had been averred,—intended against the pleader. *Foss v. Harbottle*, 503

DEPOSITIONS.

See BILL TO PERPETUATE TESTIMONY.

DEVISAVIT VEL NON.

See HEIR-AT-LAW.

DISCHARGE.

See PRISONER.

DISCHARGE OF SOLICITOR.

See LIEN, 3.

DISCOVERY.

See FORECLOSURE.

JURISDICTION, 3.

PRODUCTION OF DOCUMENTS,
1, 2, 3, 4.

1. Discovery:—Case in which a Defendant must seek for information, which he may not himself possess. *Earl of Glengall v. Frazer*, 99

2. In answer to a bill seeking to impeach a security and requiring the Defendant to set forth what communications passed between his solicitor and agents in the transaction and the Plaintiff; and what letters were written and received, and entries made on the sub-

ject by such solicitors, it is not sufficient for the Defendant to say, that the solicitors had ceased for several years since the transaction to be his solicitors or agents, and that he does not know what communications or entries they had or made : the Defendant, if he has not personal knowledge of the facts, must at least shew that he has endeavored to acquire the information from his agents in the transaction in question.

Ib.

3. The husband charged with procuring his marriage with a minor, by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts relating to such charge, upon an information under the Marriage Act, (4 Geo. 4, c. 76, s. 23,) seeking the forfeiture of his interest in the wife's property, and a settlement of the same upon her and her issue. *Attorney-General v. Lucas*, 566

DOMICILE.

See ADMINISTRATION, 4.

EVIDENCE.

See MISTAKE, 1, 2.

TRAVERSING NOTE.

1. Instruments, neither admitted nor denied, may be proved *viva voce*, although the cause is heard upon bill and answer, without replication. *Rowland v. Sturgis*, 520

2. A. contracted to purchase real estate, and died, having made his widow his universal devisee and legatee. The widow married B., who in 1793, took a conveyance of the premises contracted to be purchased by A., to himself and a trustee, reciting the contract by A.,—his will and death,—the marriage of his widow with B.; and that “thereupon B. became entitled to the beneficial interest in the purchase.” B. in 1817, sold the premises to C., and C. took a conveyance from B. and his trustee, reciting, that, by certain good and sufficient assurances in the law, the premises stood limited to B. and the trustee, but not reciting the deed of 1793. The widow died, leaving her heir-at-law an infant, who came of age in 1825, in the life-time of B. The bill was brought by the heir-at-law in 1836,

after the death of B., for a conveyance of the estate :—*Held*, that the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, and that the title of B. accrued by the marriage; that the Court would not presume, in favour of a purchaser, that B. had any other title than was so represented; that C. must be presumed to have been cognizant of and to have taken the title of B. his vendor; that the equitable title of the heir-at-law of the widow was not affected by the lapse of time; and that the heir-at-law was entitled to the decree for a conveyance of the estate. *Neesom v. Clarkson*, 163

EXCEPTIONS.

1. Exceptions to the Master's report ought to follow in form as well as in substance the objections carried in before the Master. *Ballard v. White*, 158

2. Upwards of thirty separate objections were taken to the draft report, in respect of the same number of items allowed in an account; one exception, including all the objections, was taken to the report, for that the Master ought to have disallowed the same items, or some or one of them :—*Held*, that this was informal, for the exceptant requiring the judgment of the Court on every item, the exceptions should have been in the same form as the objections, and thereby have called for such judgment; that this exception must be allowed, if it should be found that any item ought to have been disallowed; but that, notwithstanding the informality, the Court might, if it thought fit, hear the exception upon all the items, and make a special declaration as to any or all which had been improperly allowed. *Ib.*

EXECUTOR AND ADMINISTRATOR.

See ADMINISTRATION, 2, 3, 4.

COSTS, 6, 8.

RETAINER.

SOLICITOR, 1, 2.

Semble, a party suing as executor or administrator cannot sustain proceedings to recover a larger sum than that

upon which the probate-duty is calculated. *Jones v. Howells*, 342

EXHIBITS.

See BILL AND ANSWER.

PRODUCTION OF DOCUMENTS, 3.

EX PARTE PROCEEDINGS.

See PRO CONFESSO, 5.

EXTRA-PAROCIALITY.

In a suit for tithes, a district consisting of 370 acres of land, within the ambit of, and surrounded by the parish, held, after the trial of an issue at law, to be extra-parochial, and the bill dismissed with costs. *Clayton v. Meadows*, 26

FORECLOSURE.

See MORTGAGE, 2, 3.

On a motion by a defendant for an immediate decree in a foreclosure suit, under the stat. 7 Geo. 2, or under the jurisdiction of the Court, independent of the statute, the order may be made without answer; and if the bill suggests that the Defendant has parted with the equity of redemption, he will be allowed to give the required discovery as to that fact upon affidavit. *Piggis v. Cheetham*, 80

FORFEITURE.

See DISCOVERY, 3.

PIRACY, 1, 2, 3.

FORMA PAUPERIS.

See SERVICE, 2.

Where the order for leave to sue in forma pauperis has not been served, and is not rendered inoperative by any subsequent step in the cause, it is in the discretion of the Court, either to give costs to the pauper, or to order him to pay them, as the case may be. *Church v. Marsh*, 654

GENERAL ORDERS.

Lord Clarendon's Order. (1661).

See ATTACHMENT, 1.

27th April, 1748.

See JURAT.

IV. of 1828.

See TIME.

XIII. *Id.*

See AMENDMENT, 3, 4.

XVI. *Id.*

See TIME.

XVII. *Id.*

See COMMISSION, 1.

XIX. *Id.*

See TIME.

LXXIV. *Id.*

See IMMATERIALITY.

XXVI. of December, 1833.

See TIME.

V. of 9th May, 1830.

See PRELIMINARY INQUIRIES, 1, 2, 3.

VII. of August, 1841.

See APPEARANCE, 3.

VIII. *Id.*

See APPEARANCE, 1.

BILL OF REVIVOR.

PRO CONFESSO, 4, 5.

XII. *Id.*

See ATTACHMENT, 2.

WRIT OF ASSISTANCE.

XIII. *Id.*

See WRIT OF ASSISTANCE.

XV. *Id.*

See ATTACHMENT, 2.

XXI. *Id.*

See TRAVERSING NOTE.

XXIII. *Id.*

See APPEARANCE, 3.

PARTIES, 1.

XXIV. *Id.*

See COPY OF BILL, 1, 2.

XXX. *Id.* 1841.

See PARTIES, 5.

Under the 30th Order of August, 1841, the trustees of real estate by de-

vise, having the powers mentioned in the order, represent the persons beneficially interested in such real estate, (so as to make it unnecessary that persons having charges thereon should be parties), not only in suits by persons claiming adversely against the estate, but also in suits by some of the persons beneficially interested, and where the conduct of the trustees is in question *Orborne v. Foreman*, 656

XXXVIII. of August, 1841.
See ANSWER, 2, 4.
IMMATERIALITY.

XXXIX. *Id.*
See PARTIES, 5.

I. of the 11th April, 1842.
See ABSCONDING.
BILL OF REVIVOR.
PRO CONFESSO, 2, 3, 4, 5.

XVI. of 26th October, 1842.
See page 533, n. (b).

XX. *Id.*
See ADDRESS FOR SERVICE.
WRIT.
SERVICE, 1.

XXI. *Id.*
See SERVICE, 1.

XXVIII. *Id.*
See LUNATIC.

GUARDIAN.
See LUNATIC.

Testamentary guardian of an infant trustee, who was residing out of the jurisdiction, appointed guardian ad litem without either the appearance of the infant in Court, or a commission. *Shuttleworth v. Shuttleworth*, 147

HEIR-AT-LAW.

1. An heir-at-law, by his answer, admitting the execution of the will under which the Plaintiff claims, but alleging that it was revoked by a subsequent will, whereby the estate in question was devised to the Defendant, which subsequent will was unintention-

ally destroyed, and submitting either that the subsequent will ought to be established, or that there was an intestacy,—is not entitled to an issue devavit vel non. *Whitaker v. Newman*, 299
2. The Defendant, in such a case, not giving any evidence of the alleged revocation beyond the mere statement, which was read by the Plaintiff from the answer, is not entitled to any inquiry respecting it, and the Court will declare the will established. *Id.*

HUSBAND AND WIFE.
See ANSWER, 1.
APPOINTMENT, 3.
SEPARATE USE.

The testatrix gave the residue of her real and personal estate equally between her brother, her sister, and her "nephew W., and E. his wife," (E. being the niece of the testatrix):—*Held*, that the husband and wife took one share each, and not merely one share between them. *Warrington v. Warrington*, 54

IMMATERIALITY.

Under the 74th Order of April, 1829, the Master does not, on the ground of immateriality, overrule exceptions for insufficiency, unless it is clear that the question cannot be material. If the materiality be doubtful, the case is not within the Order. *Tipping v. Clarke*, 383

IMPERTINENCE.
See PLEADING, 1.

IMPROVEMENT.
See TENANT FOR LIFE.

INFANT.
See GUARDIAN.

An infant plaintiff coming of age during the progress of the cause, and disapproving of the proceedings, cannot appear in the proceedings by counsel, other than those who appear for the Plaintiffs generally: he can only complain of or repudiate the proceedings by making them the subject of a

special application. *Ballard v. White*,
158

INJUNCTION.
See AFFIDAVIT, 2.

1. Equity confessed on the answer. *Bentinck v. Willink*, 1
2. The Court will not, on the application of a mortgagee out of possession, restrain the mortgagor from proceeding to fell timber growing upon the mortgaged estate, unless the security is insufficient. *King v. Smith*, 239
3. What proportion the value of the mortgaged property should bear to the mortgage debt, in order to be deemed a sufficient security within the rule under which the Court acts in restraining waste by the mortgagor—*quere*. *Ib.*

INSOLVENT DEBTOR.
See COSTS, 6.

Under the *stat.* 7 Geo. 4, c. 57, all persons who are creditors of an insolvent debtor, at the time his petition for discharge is filed in the Court for the Relief of Insolvent Debtors, are entitled, taking proper steps for that purpose, to participate in his estate, whether the same have or have not been inserted by the insolvent in his schedule. *Borell v. Dann*, 440

INTEREST.

Interest on debts by judgment recovered against the executor. *Gaunt v. Taylor*, 414

INTERROGATORIES.
See ANSWER, 4.

INTITULING CAUSE.
See MOTION.

JOINT-STOCK COMPANY.
See PARTNERSHIP, 1, 2.

When the relation of trustee and cestui que trust begins, as between the projectors of public companies and such companies. *Foss v. Harbottle*, 489

JOINT-TENANCY.
See HUSBAND AND WIFE.

JURAT.

Form of the jurat in taking the answers of Defendants, and particularly where the Defendant is illiterate. *Wilton v. Clifton*, 535

JURISDICTION.

See STATUTES, CONSTRUCTION OF, 1.

1. The mortgagee of a ship, by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry, within thirty days after the return of the ship to port, as required by the Registry Act, the registered owner having after that time become bankrupt,—has no equity, distinct from his legal rights, to restrain the sale of the ship by the assignees; the title to the ship, after the bankruptcy, depending upon the application of the rule of law with regard to order and disposition. *Campbell v. Thompson*, 140
2. A Banking company, in acknowledgment of monies deposited with them by H. gave him two accountable receipts for 100*l.* each, on which, according to the course of dealing, interest would be paid. H. died; and pending a contest for the administration of his estate, the receipts came into the possession of a stranger, who fraudulently obtained payment from the bank, and the receipts were returned to the bank, and cancelled:—*Held*, that the administrator of H. might sustain a suit in equity against the banking company for payment of the sum for which the receipts were given. *Pearce v. Creswick*, 286
3. The necessity, arising from the nature of a transaction, to sue in equity for discovery, is a material circumstance to be regarded in considering the jurisdiction of the Court to give relief in the same case; but the necessity of coming into equity for discovery does not necessarily carry with it the right to relief. *Ib.*
4. Where, on a bill for relief, by a Plaintiff having a legal demand,—if the court of equity had refused its aid, the Plaintiff would have been compelled to try his right at law, whilst documents constituting evidence of his right were in the possession of the Defendant, the Court, in order to determine the title of

the Plaintiff to the possession of the documents, being obliged to enter into the legal question, will entertain the whole case, and give the Plaintiff the same relief as he would have had at law. *Ib.*

LEGACY.

See MISTAKE, 2.

1. The testator gave certain pecuniary legacies to his daughters respectively, one half to be invested and secured from the control of any husband, the interest to be paid to them in the meantime, and the principal disposed of as they should direct, *to their issue*; but in case they should *die without issue*, he gave the principal among the *Survivors* of his children in equal shares:—*Held*, that the first bequest was limited to issue living at the death of the children, and that the gift on failure of *issue* referred to the same objects. That the gift did not pass the accruing shares of a parent dying, leaving issue, to their issue. *Leeming v. Sherratt*, 14

2. A gift by will of all the interest of the testatrix in certain stock, followed by a codicil directing that a debt owing to her should, at her death, be laid out in the same stock, will not pass the amount of the debt to the legatee of the stock. *Havard v. Price*, 98

3. Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and, in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parents' place:—*Held*, first, that no brother or sister, who died before the date of the will, was capable of taking under the bequest, and therefore, the issue of any brother or sister, who was dead before the date of the will, could not take by substitution; secondly, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife; and thirdly, that the brothers and sisters, who survived the testator, and afterwards died *without issue* in the lifetime of the wife, were entitled to shares in the residue. *Gray v. Garman*, 268

4. Several bequests to a servant of the testator, made in eight different in-

struments, held to be all cumulative, notwithstanding the gift to the party by the last codicil was much larger than any of the preceding gifts to him; and the whole amount given by that codicil was expressed as being given to *provide* for the servants of the testator. *Suisse v. Lord Lowther*, 424

5. Where a testator makes several gifts to a stranger by different instruments, the presumption is, that such gifts are cumulative, and the circumstance of differences in their character or amount, or of a further motive or reason assigned upon the instrument, tends to strengthen the presumption.

LEGATEE.

See PARTIES, 2, 4, 5.

LEGATEE'S SUIT.

It is no objection to the hearing of a suit for a pecuniary legacy in which assets are admitted, that a decree for the administration of the estate of the testator has been made at the suit of a residuary legatee; but whether the Court would direct the accounts of the same estate to be taken in both suits—*quere*. *Suisse v. Lord Lowther*, 424

LIFE ANNUITY.

See CONSIDERATION.

LIEN

See CREDITOR'S SUIT, 2.

NOTICE, 3.

PARTNERSHIP, 1.

POLICY OF INSURANCE.

SOLICITOR, 2.

1. The solicitor of an executrix and devisee, paying a sum of money in exoneration of an adverse claim on part of the testator's estate, does not, as against creditors of the testator, necessarily and by force of the transaction alone, acquire a lien upon the estate, or on the title-deeds, for the sum which he so paid. *Christian v. Field*, 177

2. The solicitor of the executrix having paid a sum which was due to a third party, who had a lien on title-deeds belonging to the testator's estate for the amount, gave a receipt for the deeds in the name of the executrix, and, as her

solicitor, carried into the Master's office her examination, in which the sum he had so paid was stated to have been paid by the executrix, and was allowed accordingly:—*Held*, that the solicitor must in such circumstances, be presumed to have made the payment on the behalf and on the personal security of his client; and that he could not claim a lien upon the deeds for the amount. *Ib.*

3. Where a party has employed, as his solicitors in a cause, a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to his new solicitor, upon the usual undertaking for saving the lien of the discharged solicitors. *Griffiths v. Griffiths*, 587

LIMITATION TO ILLEGITIMATE CHILDREN.

The objection to the validity of a limitation to unborn illegitimate children is not founded exclusively on the uncertainty of description; nor, *semble*, is there any distinction between the validity of a limitation in favour of such persons, whether described as the children of a man, or the children of a woman. *Dover v. Alexander*, 275

LITERARY PROPERTY.

See PIRACY.

LUNATIC.

The order appointing a solicitor to be the guardian ad litem of a lunatic, not found so by commission, may be made under the 28th Order of October, 1842, on the application of the Plaintiff; but it cannot be made without service of notice upon the alleged lunatic. *Brooks Jobling*, 155

MAINTENANCE.

See ABSOLUTE INTEREST.

MARRIAGE ACT

See DISCOVERY, 3.

MARRIAGE, RESTRAINT OF.

See CONDITION.

MASTER.

See COMMISSION, 2.

MISTAKE.

1. A mistake of the law or practice of the Court is not, *per se*, a ground for allowing a party to go into evidence, on facts at issue at the hearing of the cause, *semble*. *Woodgate v. Field*, 211

2. That the Court would not inquire into the fact of whether a testator was mistaken or not, with reference to his daughters's health or capacity, assigned by his will as a reason for imposing a condition in restraint of marriage. *Morley v. Reynolds*, 570

MORTGAGEE.

See ADVERSE POSSESSION.

MORTGAGE.

See CREDITOR'S SUIT, 2.

COLONIAL LAW.

CONVERSION.

FORECLOSURE.

INJUNCTION, 2, 3.

JURISDICTION, 1.

NOTICE, 3.

1. Bill by the owner of an estate in Demerara, against an incumbrancer thereon to restrain him from enforcing payment in this country of notes which had been given for part of the debt, on the ground that the incumbrancer could not deliver up the grosse copy of the acts of hypothecation, which it was alleged was necessary to a valid discharge. The common injunction was obtained. The answer admitted that the incumbrancer had no grosse copy in his possession, and that a second grosse copy would not be issued by the Court without indemnity; but it did not state for what purpose or in whose favour the indemnity was required, or that grosse copies had not been actually taken out in respect of the charges which the Defendant had upon the estate, or that any inquiries or searches had been made in

reference to these questions, or that any cancellation or discharge had been entered in Court in respect of the previous payments on account of the debt. The Plaintiffs and the Defendant had both acted with regard to the estate, in their previous dealings concerning it, without requiring the production of the grosses. The Court dissolved the injunction, upon the incumbrancer giving security to indemnify the Plaintiffs from any consequences arising from the absence of the grosses *Bentinck v. Willink*, 1

2. Under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgage of land, whose mortgage debt and interest are secured also by a bond or covenant, is entitled in a foreclosure suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt, within twenty years before the institution of the suit *Du Vigier v. Lee*, 326

3. The price of redeeming the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in the like circumstances in a suit by the mortgagee to foreclosure. *Ib.*

4. If the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrear of interest, *semble*, *Ib.*

MOTION.

An order to dismiss, for want of prosecution, obtained upon notice of motion, intitled in the name of the Plaintiff and three Defendants,—where one of the Defendants had been struck out by amendment,—discharged, with costs, as irregular. *Rowlatt v. Cattell*, 186

NEGLIGENCE.

See VENDOR AND PURCHASER, 2.

Negligence, as applied to cases of constructive notice, supposes the disregard of a fact known to the purchaser, which indicated the existence of the fact, the knowledge of which the Court imputes to him; and such negligence may, without a fraudulent motive, be so gross as to justify the charge of con-

structive notice. *Semb.* *West v. Reid*, 249

NOTICE.

See NEGLIGENCE.

PARTNERSHIP, 3.

POLICY OF INSURANCE.

PRODUCTION OF DOCUMENTS, 1.

VENDOR AND PURCHASER, 3.

1. A sale took place under a decree. The abstract stated that the person, at whose death the sale was to be made, proved the will of the testator, but it did not state the pleading in the cause, or whether that person was living or dead:—*Held*, that this was not a sufficiently distinct intimation to the purchaser that the time of the sale had, without any sufficient ground, been anticipated. *Blacklow v. Laws*, 40

2. A purchaser may be presumed to have investigated every instrument, which directed or inferentially forms a link in the title to the property, but not instruments which are neither directly nor presumptively connected with it, and may only by possibility affect it. *Semb.* *West v. Reid*, 249

3. After the commencement of a treaty for the sale of an estate by A., and the purchase of it by B.,—A. agreed to give C. a mortgage on the estate as a security for an antecedent debt, and notice of the agreement was given to the solicitors of B. The treaty for the sale afterwards ceased to be prosecuted for upwards of five years, during part of which time the suit of an adverse claimant of the estate was pending. A. then died, and B. purchased the estate at a lower price from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B. from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage:—*Held*, under the circumstances of the case, that B. and D. had through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. *Fuller v. Bennett*, 394

NOTICE OF MOTION.

See AFFIDAVIT, 2.

OFFICE COPY.

See AMENDMENT, 5.

ORDERS OF COURSE.

See SERVICE, 2, 3.

ORDER AND DISPOSITION.

See JURISDICTION, 1.

PARTNERSHIP, 4.

POLICY OF INSURANCE.

ORDER TO ELECT.

See SPECIFIC PERFORMANCE.

PARTIES.

See DECREE.

GENERAL ORDERS.

XXX. of 1841.

SUPPLEMENTAL BILL.

1. In a suit against the trustees of real estate, having the legal fee, and full powers of sale,—the object being to raise a legacy charged on such estate,—the equitable tenant in tail thereof is a necessary party, and it is not sufficient to serve him with a copy of the bill under the 23rd Order of August, 1841. *Barkley v. Lord Reay*, 306

2. A person to whom a legacy or an annuity, is given, to be paid out of the residue after the death of the legatee for life of such residue, is not a necessary party to a suit for administration of the estate, brought by legatees of aliquot shares of the ultimate residue. *Fisk v. Norton*, 381

3. Twenty creditors, interested in a real estate, are not so large a number that the Court will, on the ground of inconvenience alone, allow a few of them to represent the others, and dispense with such others as parties in a suit to recover the estate against the whole body of creditors. *Harrison v. Stewardson*, 530

4. That where a trust fund is to be administered under the direction of the Court, the general rule requiring the cestui que trusts to be parties, is applicable to foreign trustees and cestui que trusts, residing out of the jurisdiction,

unless a special case of difficulty or inconvenience in the application of the rule be shewn. *Weatherby v. St. Giorgio*, 624

5. The court will not, upon the argument of the objection for want of parties, under the 30th and 39th Orders of August, 1841, order that persons beneficially interested be made parties: such order, if made, will not be made until the hearing of the cause. *Osborne v. Foreman*, 656

PARTIES OUT OF THE JURISDICTION.

The legatees of two-sixths of a fund, the title to which was in question, being out of the jurisdiction, the Court made the declaration of right with respect to the other four-sixth parts only. *Morley v. Rennoldson*, 570

PARTNERSHIP.

See PRODUCTION OF DOCUMENTS, 4.

1. Trust-funds were invested in the purchase of transferrable shares in a Banking Company, in the name of one of the trustees, who executed a declaration of the trusts thereof, (the rules of the company not allowing shares to stand in the name of joint-owners of cestui que trusts). The trustee was also a proprietor of shares in his own right in the same Company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual, shares held by the different proprietors the same being in the nature of capital, expressed by quantity. The trustee contracted to assign a certain number of shares to the Banking Company as a security for advances which they made to him: he afterwards became bankrupt:—*Held*, that having regard to the deed of association, the Banking Company had no lien, founded on the general relation of partnership, on the shares of a proprietor, in respect of a debt owing by the proprietor to the Company. *Pinkett v. Wright*, 120

2. That the right which the directors of the Banking Company might have, under the deed of association, of withholding their approval of the transfer of

shares, cannot be exercised for the purpose of previously obtaining payment of a debt due to the Bank, from the proprietor whose shares are proposed to be transferred. *Ib.*

3. That the equitable title of the cestui que trusts to the shares purchased with the trust-funds was perfected, without notice to the Banking Company, by the execution of the declaration of trust thereof. *Ib.*

4. That the special contract by the proprietor to assign his shares to the Banking Company, as a security for their advances, gave the Bank a lien on the shares then standing in the name of the proprietor, of which he was the beneficial owner; and that the same were not in his order and disposition at the time of the bankruptcy. *Semble. Ib.*

5. The implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm, and therefore a party advancing money to one partner, knowing that it was for the latter purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority. *Fisher v. Tayler.* 218

6. Two partners in a firm announced their intention of adding 16,000*l.* to their capital, by admitting one or more additional partners. *W.* entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of 4000*l.* to that partner by way of loan, on the security of the bills of the firm, and also of the separate estate of such partner:—*Held*, that *W.* had, so far as this evidence went, notice that the loan of 4000*l.* was an advance, not within the implied authority of the partner obtaining it, the other partner having authorized the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, and the advance might have been within the scope of the partnership authority, without reference

to the proposed increase of capital, liberty was given to *W.*, for the purpose of trying that question, to bring an action on the bills against the executors of the other partner. *Ih.*

PAYMENT OUT OF COURT.

Order for payment of the dividends of a fund in Court, to the executors, for distribution amongst the parties interested, before the accounts of the estate were taken, the executors admitting assets of the testator for all purposes. *Shewell v. Shewell.* 154

PETITION.

See APPOINTMENT, 3.

PIRACY.

1. The proprietor of a book, whose copyright has been invaded by the printing of a similar work, and who is entitled to an injunction to restrain the printing and sale of the unlawful work, is not, under the stat. 54 Geo. 3. c. 156, s. 4, entitled to an order for the delivery up of the illegal copies,—if the book, the copyright of which has been infringed, was not composed, and entered according to the statutes, at the time the illegal copies were printed. *Colburn v. Simms.* 543

2. *Semble*, there is no common law right in the author or proprietor of a book which is pirated, to the delivery up of the copies of the illegal work; and, therefore, if such relief is given in equity, it must be under the provisions of the statutes for the protection of literary property. *Ib.*

3. Whether the copies of the illegal work would in any case be ordered to be delivered up in a suit to which the person at whose expense and on whose account they had been printed was not a party,—*Quere.* *Ib.*

4. Principle upon which the Court gives an account of the profits of the unlawful work, in the case of piracy. *Id.* 560

PLAINTIFF.

See CREDITOR'S SUIT, 2.
INFANT.

PLEA.

See Costs, 3.

PLEADING.

See BILL OF REVIVOR.

DEMURRER.

IMMATERIALITY.

SUPPLEMENTAL BILL.

1. After the trustees of a charity had put in their answer in a suit, and before the hearing, one trustee died, and another resigned. New trustees were appointed in their stead, but were not made parties to the cause before the hearing. After the cause was heard and judgment pronounced, an information was filed against the new trustees, praying the benefit of the former proceedings against them, and that they might be removed, as persons not duly qualified. The new trustees by their answer made a case to shew that the decree, if enforced, would be prejudicial to the charity, and insisted that it ought not to be made against them.—*Held*, that the new trustees came in under the founder, and not under the trustees for whom they were substituted;—that the issue on the information was not merely whether the new trustees were bound or not by the decree;—that, having been trustees at the time of the decree, they ought to have been made parties;—that not having been parties, they were not so bound by the former proceedings as to be precluded from making a case by way of defence to the suit; and that the statement in their answer of further facts for that purpose was therefore not impertinent. *Attorney-General v. Foster*, 81

2. An averment in a bill to restrain the setting up of outstanding terms in ejectment,—that H. being or claiming to be entitled to the premises, devised them to the Plaintiff, and positively averring the title of the Plaintiff thereto accompanied by statements shewing that his claim was founded upon the devise,—*held* to be sufficiently certain upon general demurrer. *Houghton v. Reynolds*, 284

3. There is no rule of pleading which requires that the facts creating the title of the Plaintiff to relief must appear on the stating part or before the charging part of the bill; but an allega-

tion that the Defendant pretends, &c., and a general charge of the contrary of such pretences, is not an averment of the facts implied in the contrary charge. *Ib.*

4. Bill by two of the proprietors of shares in a company incorporated by act of Parliament, on behalf of themselves and all other the proprietors of shares except the Defendants, against the five directors, (three of whom had become bankrupt), and against a proprietor who was not a director, and the solicitor and architect of the company, charging the Defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened, and wasted; that there had ceased to be a sufficient number of qualified directors to constitute a board; that the company had no clerk or office; that in such circumstances the proprietors had no power to take the property out of the hands of the Defendants, or satisfy the liabilities or wind up the affairs of the company; praying that the Defendants might be decreed to make good to the company the losses and expenses occasioned by the acts complained of; and praying the appointment of a receiver to take and apply the property of the company in discharge of its liabilities, and secure the surplus: the Defendants demurred.—*Held*, that, upon the facts stated, the continued existence of a board of directors *de facto* must be intended; that the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing board was not excluded by the allegations of the bill; that in such circumstances there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of; that therefore the Plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation; and that the demurrers must be allowed. *Foss v. Harbottle*, 461

POLICY OF INSURANCE.

1. In 1816, D. assigned a policy of insurance on his life to a trustee to secure a sum of money owing to W. ;

and soon afterwards, the solicitor of W. caused a memorandum to be entered in the office of the Insurance Company, directing that all letters were to be sent to such solicitor, and the premiums were thenceforth paid by W., through the hands of such solicitor; but the Insurance Company were not informed on whose behalf the solicitor acted. In 1826, D. became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by W., through his solicitor, during his life, and by the executors of W., through their bankers, after his death. D. died in 1839. —*Held*, that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the insurance office of the assignment of the policy to take it out of such order and disposition. *West v. Reid*, 249

2. That the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy. *Ib.*

That the executors of W. had a lien on the policy for the amount of the premiums which had been paid by W., and his estate, and the interest thereon; and that they were entitled to payment of the amount thereof out of the monies payable under the policy. *Ib.*

POWER.

See APPOINTMENT, 2.

PRACTICE.

See ADDRESS FOR SERVICE.

AFFIDAVIT.

AMENDMENT.

ANSWER, 1.

APPEARANCE.

ATTACHMENT.

BILL AND ANSWER.

BILL OF REVIVOR.

COMMISSION.

CONFIRMING REPORT.

CREDITOR'S SUIT.

DECREE.

DEPOSITIONS.

EVIDENCE, 1.

EXCEPTIONS.

FORMA PAUPERIS.

GUARDIAN.

INTITULING CAUSE.

MOTION.

OFFICE COPY.

PARTIES OUT OF THE JURISDICTION.

PAYMENT OUT OF COURT.

PRELIMINARY INQUIRIES.

PRISONER.

PRODUCTION OF DOCUMENTS.

PRO CONFESSO.

PROOF OF DEBT.

RECEIVER.

SERVICE.

TIME.

TRAVERSING NOTE.

WITNESS.

WRIT.

WRIT OF ASSISTANCE.

PRELIMINARY INQUIRIES.

1. Motion under the 5th Order of the 9th of May, 1839, for special accounts and inquires, not merely preliminary to the decision, at the hearing, of the questions in the cause, but involving the decision of some of those questions, refused. *Curd v. Curd*, 116

2. Motion for inquiries, as preliminary, under the 5th Order of the 9th of May, 1839, refused, where the necessity of the inquiries would depend upon a certain effect being given to a will of difficult construction. *Breeze v. English*, 118

3. Order for preliminary inquiries, under the 5th Order of the 9th of May, 1839, refused, where some of the Defendants, suggested to be out of the jurisdiction had not appeared. *Barret v. Buck*, 520

PRISONER.

A defendant, in custody for not answering, and brought up to have the bill taken pro confesso against him, within the time limited by the statute, 1 W. 4, c. 36, s. 15, rule 13, asked for time to put in his answer, and three weeks was thereupon given him, with liberty to apply for his discharge upon having answered. The time fixed by the same rule of the statute for retaining a defendant in custody, without obtaining the order for taking the bill pro confesso, expired during the three weeks: no answer was put in:—*Held*, that in such circumstances the defendant was not en-

titled to his discharge under the 13th rule of the statute, but was remitted to the situation he would have been in if that provision of the statute had not existed. *Woodward v. Conebeer*, 506

PROBATE.

Semble, the question whether a prerogative or a diocesan probate is necessary, depends, not upon the place in which the estate of the testator comes to be administered, but on the local situation of the property at the time of his death. *Jones v. Howells*, 342

PROBATE DUTY.

See EXECUTOR AND ADMINISTRATOR.

PRO CONFESSO.

See ABSCONDING.

BILL OF REVIVOR.

1. A defendant in contempt for not answering the bill,—brought to the bar and remanded,—and again brought up by habeas corpus, twenty-eight days after having been remanded, upon motion to take the bill pro confesso, under the stat. 1 Will. 4, c. 36, s. 15, rule 2, may file his answer after the motion is made; and, *semble*, at the latest time on that day. *Robinson v. Stanford*, 149

2. Process for taking a bill pro confesso under the 1st Order of the 11th of April, 1842, against a Defendant deemed to have absconded, after appearance by his own clerk in Court. *Harrison v. Stewardson*, 533

3. Order 1. of the 11th of April, 1842, as to taking bills pro confesso, applies to suits commenced before, as well as after, the date of the order. *Ib.*

4. Proceedings for taking the bill pro confesso, under the Order 1 of the 11th of April, 1842, against a Defendant deemed to have absconded, for whom an appearance has been entered under the Order VIII. of the 26th of August, 1841, and who does not afterwards appear by his own solicitor. *Eltoft v. Brown*, 618

5. Where a Defendant, after being served with the subpoena to appear and answer the bill, does not enter an appearance by his own solicitor, but ab-

sconds to avoid the process of the Court, the Plaintiff may, on the bill taken pro confesso, under the Order 1, of the 11th of April, 1842, proceed *ex parte* as against a defendant who has not appeared, although the plaintiff has entered an appearance for him, under the Order VIII. of the 26th of August, 1841. *Eltoft v. Brown*, 621

6. Bill ordered to be taken pro confesso in vacation, under the statute 1 Will. 4, c. 36, s. 15, rule 2. *Simmons v. Wood*, 644

PRODUCTION OF DOCUMENTS.

1. Title-deed of the Defendant ordered to be produced, where it contained a recital that might affect him with constructive notice of the plaintiff's interest in the estate. *Neesom v. Clarkson*, 166

2. Documents directed to be deposited with the clerk of records and writs, after an order allowing the Plaintiff or his solicitors to inspect and take copies thereof at the office of the Defendant's solicitors,—the solicitors not agreeing by whom the copies were to be made. *Prentice v. Phillips*, 152

3. Delay in moving for production of documents until after the Defendant's witnesses are examined, and the exhibits marked whereby the Plaintiff may ascertain which are the Defendant's exhibits, is no objection to the order being made. *Duke of Beaufort v. Taylor*, 245

4. In a suit for taking a partnership account between solicitors, the Plaintiff is entitled to the discovery and production in the usual way, of papers material to the account, although such papers relate to professional business transacted for their clients:—*Semble. Brown v. Perkins*, 540

PROFESSIONAL CONFIDENCE.

See PRODUCTION OF DOCUMENTS, 4.

PROJECTORS.

See JOINT-STOCK COMPANY.

PROOF OF DEBT.

See CREDITOR'S SUIT, 5, 6, 7.

PROOF OF EXHIBITS.

See BILL AND ANSWER.

PROPER USE.

See SEPARATE USE.

RECEIVER.

Receiver of a *West India* estate applied for by one of the parties entitled to a charge thereon, against the trustee, refused, notwithstanding the estate was depreciated in value, and incumbrances thereon were increasing,—the management of the trustee not appearing to be improper. *Barkley v. Lord Reay*, 308

RECITAL.

See EVIDENCE, 2.

PRODUCTION OF DOCUMENTS, 1.

REDEMPTION.

See MORTGAGE, 3.

RETAINER.

The representative of a deceased executor, in accounting for the executor's receipts of the trust estate,—*held* not to be entitled, by way of *discharge*, to the amount of a debt owing to the executor from his testator, without evidence of retainer of the debt by the executor in his lifetime: the amount can only be claimed as a *debt* against the estate *Burge v. Brutton*, 373

REVOCATION.

See HEIR-AT-LAW.

SEPARATE USE.

The testator directed an annuity to be paid by the trustees, appointed by his will into the proper hands of his daughter A., the wife of L, for her own proper use and benefit:—*Held*, that it was not a trust for the separate use of the daughter. *Blacklow v. Laws*, 49

SERVICE.

See AMENDMENT, 1, 2.

1. Personal service on a Plaintiff, (suing in person), of notice of appearance, is regular, under the 21st Order of the 26th of October, 1842; where the Plaintiff has omitted to endorse on

the subpoena to appear an address for service, as required by the 20th Order of the 26th of October, 1842, although an address for service has been endorsed on the bill. *Price v. Webb*, 513

2. An order for leave to sue in forma pauperis is not inoperative, although it is not served, where there is no mala fides in holding it, and no step has been taken in the cause inconsistent with the order. *Church v. Mash*, 652

3. *Semble*, the same rule applies to orders of course, generally. *Ib.*

SHIP REGISTRY ACT.

See JURISDICTION, 1.

SOLICITOR.

See DISCOVERY, 2.

LIEN, 1, 2, 3.

NOTICE, 3.

PRODUCTION OF DOCUMENTS, 4.

1. An executor who acts as solicitor in a cause, in which he is a party in his representative character, though he is only allowed personally, as against the estate, such costs as he actually pays,—*held* entitled to be allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive. *Burge v. Brutton*, 373

2. An executor is not entitled to be allowed the costs of a suit in respect of the estate, prosecuted by a solicitor whom he did not employ: the solicitor himself is the party to apply for costs, as a lien on the fund which he has recovered. *Ib.*

SOLICITOR AND CLIENT.

1. On a question of the propriety of a purchase by a solicitor from his client, solicitor, in order to sustain the transaction, must, if he was solicitor *in hac re*, shew that he gave his client all that reasonable advice against himself, which his office of solicitor would have made it his duty to have given him against a third person; but the nature of the proof varies according to the subject of the purchase, the relative situation of the parties, and the equality of the footing upon which they stand, in reference to the subject of the contract; and, although the relationship of attorney and

tee must be presumed to have transferred or pledged such shares as belonged to himself, and, so far as he had shares of his own, not to have transferred or pledged the shares of his cestui que trusts. That, therefore, the cestui que trusts were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy, as could be presumed to be identical with the shares in which the trust-funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. *Pinkett v. Wright*, 120

TRUST FOR SALE.

See CONVERSION.

UNDUE INFLUENCE.

See SOLICITOR AND CLIENT, 1, 3.

VACATION.

See PRO CONFESSO, 6.
TIME.

VENDOR AND PURCHASER.

See CONDITIONS OF SALE.

SOLICITOR, 3.

TRUSTEE.

1. Where an estate was directed by the testator to be sold after the death of a certain person, and the sale was made during the life of that person, under a decree, some of the persons interested in the proceeds being infants or not sui juris, the Court would not compel the purchaser to accept the title. *Blacklow v. Laws*, 40

2. The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees, in conducting the sale,—such circumstances being entirely collateral to any question of title. *Borell v. Dan*, 440

3. A sale of the estate of an insolvent debtor, made bona fide, at a public auction, is not, after conveyance to the purchaser, necessarily voidable in equity only because the purchaser, after the sale, but before the conveyance, had notice of circumstances attending the conduct of the sale by the assignees, amounting to negligence on their part. *Ib.*

VOID LIMITATION.

See CONDITION.

WAIVER.

See CONDITIONS OF SALE, 2.

WILL.

See ABSOLUTE INTEREST.

1. Gift of a residue of real and personal estate to trustees to sell, get in, and pay and divide the money arising therefrom, unto and equally among the testator's children, so soon as the youngest should attain twenty-one,—the daughter's shares to be invested and secured, and the interest paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child, the share to be divided amongst the survivors of the testator's children equally, and, in case of the death of any of his children leaving lawful issue, the testator gave to such issue the share the parent would have been entitled to have:—*Held*,

That the residuary share of a child, who attained twenty-one, and died before the time of division, passed to his representatives. *Leeming v. Sherratt*, 18

2. That no child, who did not attain twenty-one, was intended to take any interest in the residue. *Semble. Ib.*

3. That the word "survivors" in the residuary clause, must be construed in its natural sense, and not as importing "others," and that this construction of the word in one part of the will must govern the construction of the same word in the other part. *Ib.*

4. That the gift of the part or share of a parent dying leaving issue, to such issue, applied both to the original and accruing shares of the residue, but not to the particular legacies. *Ib.*

5. The Testator gave his real and personal estate in trust for his nephew John for life, and, after his death, to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there was no such son of John, to two other nephews of the testator, and their sons successively; and in case none of them, the said three neph-

ews, should have a son who should survive the survivor of them, and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters :—*Held*, that the testator in the words of devise to the fourth nephew must be construed to mean that such limitation should take effect in case none of the first three nephews should leave a son surviving his parent and attaining twenty-one,—a different construction being repugnant to specific directions as well as to the general scheme of the will,—creating cases of intestacy,—and supposing a capricious and irrational intention ;—and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate. *Hillersdon v. Lowe*, 355

6. Circumstances in which one testamentary instrument is held to be in substitution for, or a mere repetition of, another. *Suisse v. Lowther*, 424

WITNESS.
See COMMISSION.

A witness, called by the Plaintiff, and cross-examined by the Defendant, before the hearing, on a point not then in issue in the cause, allowed to be examined again by the Defendant on the same issue, when raised before the Master under the decree. *Whitaker v. Wright*, 321

WRIT.

The subpoena to appear and answer is a writ to which the 20th Order of the 26th of October, 1842, applies although it is not sealed in the Clerk of Records and Writs Office. *Price v. Webb*, 515

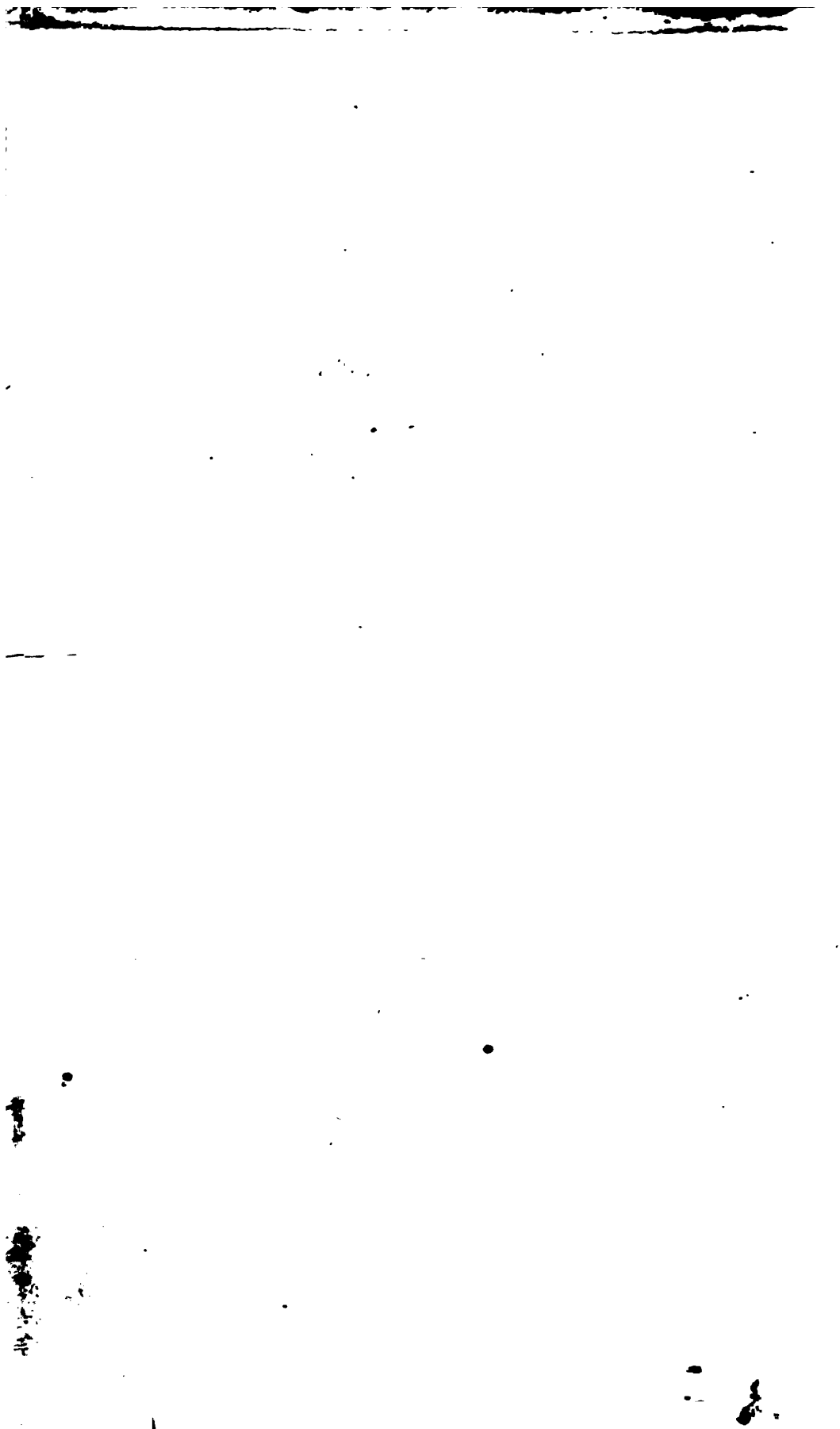
WRIT OF ASSISTANCE.

A party is entitled to a writ of assistance, under the 13th Order of August, 1841, to enforce obedience to a decree, although the memorandum, in the form prescribed by the 12th Order of August 1841, endorsed upon the copy of the decree served, intimated that the party neglecting to obey it would be liable to process by attachment, serjeant-at-arms, or sequestration. *Bower v. Cooper*, 412









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